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EVENING POST JOB PRINTING HOUSE, NEW YORK.

No. XXXX 153
Brief of Russell
Filed Dec. 18, 1899.

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JAMES H. MCKENNEY
Clerk

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1899.

H. M. BEDFORD and LOU M. BEDFORD, his wife,
Appellants,

AGAINST

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, New York,
Appellee.

Certified from the United States Circuit Court of Appeals for the Sixth Circuit.

IN THE MATTER OF THE PETITION OF BEDFORD *et al.* FOR A WRIT OF *certiorari* TO REQUIRE THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT TO CERTIFY TO THE SUPREME COURT OF THE UNITED STATES THE WHOLE RECORD IN THE ABOVE ENTITLED CAUSE FOR ITS REVIEW AND DETERMINATION.

BRIEF IN BEHALF OF EASTERN BUILDING & LOAN ASSOCIATION IN OPPOSITION TO THE MOTION.

I.

This case is certified by the Judges of the Circuit Court of Appeals for the Sixth Circuit under § 6 of the Act of March 3, 1891 (26 Stat., 826).

II.

There are four distinct questions of law, very carefully and accurately framed, certified to the Supreme Court for its determination. Those questions are as follows:

"*First Question:* Was the validity of the notes signed in Tennessee by the maker, manually delivered by him to the soliciting agent of the association at Memphis to be transmitted to the association at that place and payable at Syracuse, to be determined by the laws of Tennessee or of New York?

"*Second Question:* Was the validity of the mortgage executed and delivered under the same circumstances to be determined by the validity of the note to which its was incident,or by the law of the State where the land lay which the mortgage conveyed and which upon default must be sold to pay the notes?

"*Third Question:* May a State by its laws forbid the transaction of business within its borders, annul the contracts of its citizens entered into and to be performed without the State, when those contracts are but the consummation of the inhibited business within the State without an infraction of the Fourteenth Amendment to the Constitution of the United States?

"*Fourth Question:* Even if a State by law refuse enforcement of such a contract in its courts, should a Circuit Court of the United States sitting in the State refuse to enforce it when jurisdiction over the parties exists by reason of their diverse citizenship?"

III.

These questions are preceded by such a statement of the *ultimate*, as distinguished from the *evidential* facts, as the Judges of the Circuit Court of Appeals deem established, and consider necessary to enable this Court to clearly apprehend the state of facts out of which the questions certified arise. The statement of facts is adequate under the rules and settled practice of this Court in such cases.

Rule 37, § 1.
Sigafus *v.* Porter, 85 Fed. Rep., 689.
Jewell *v.* Knight, 123 U. S., 426.
Cross *v.* Evans, 167 U. S., 60.
Texas & Pac. R. Co. *v.* Anderson, 149 U. S., 237.
White *v.* Ewing, 159 U. S., 36.
White *v.* Ewing, 66 Fed. Rep., 2.

IV.

In effect, the motion and petition now submitted in behalf of the appellants, is an attempt to get this Court, upon a certified case from the Circuit Court of Appeals, to review the case upon the facts and the evidence, notwithstanding the settlement of the facts by the determination of the case in the Courts below.

See—

Stuart *v.* Hayden, 169 U. S., 1, 14.
Dravo *v.* Fabel, 132 U. S., 487, 490.
Compania de Navigacion la Flecha *v.* Brauer, 168 U. S., 104, 123.
Eastern Building & Loan Asso. *v.* Bedford, 88 Fed. Rep., 7.

V.

It is not the purpose of the certification clause in the act of 1891 to make it necessary for this Court to pass upon the whole case, both as to the facts and the law, and if the Circuit Courts of Appeal cannot themselves so certify a case to this Court as to accomplish this end, certainly the parties litigant should not be allowed to defeat the very purpose of the clause in question by invoking the writ of *certiorari* to bring up the entire record, when the statement of the case certified is clear and amply sufficient to elucidate the questions submitted by the Circuit Court of Appeals.

Columbus Watch Co. *v.* Robbins, 148 U. S., 266.

Graver *v.* Evans, 167 U. S., 60.

United States *v.* Union Pac. Ry. Co., 168 U. S., 505, 512.

McHenry *v.* Alford, 168 U. S. 651, 658.

Fire Ins. Co. *v.* Wickham, 128 U. S., 426, 432.

VI.

It is true that under § 2 of Rule 37, it seems to be permissible for either party to a case certified from a Circuit Court of Appeals to make application "to this Court that the whole record and cause may be sent up to it for its consideration."

Rule 37, § 2.

But it is not the purpose of this provision of Rule 37 to make it incumbent on this Court to review a controversy as to the bearing and weight of the evi-

dential facts shown by the record in the Court below.

United States *v.* Perrin, 131 U. S., 55, 58.
Fire Ins. Co. *v.* Wickham, 128 U. S., 426, 482.

"It is the fundamental facts that are to be stated, not the evidential facts from which the fundamental facts are found."

Sigafus *v.* Porter, 85 Fed. Rep., 689, 690; Rule 37, § 1.

VII.

The "statement of facts" called for by the Rule is in effect such a statement of the ultimate or operative facts as is required in a complaint under the rules of code pleading, to the exclusion of the mere evidential facts.

Phillips on Code Pleading, §§ 185-187.
Bliss on Code Pleading (2d Ed.), § 206.

By the motion and petition of appellants, this Court is asked to examine the record in the Court below for the purpose of ascertaining the *evidential* facts, and to have that record brought up in order that this Court may determine all the issues in the case. It is not claimed that the Circuit Court of Appeals for the Sixth Circuit has incorrectly certified the facts, but that it has not certified *all* the facts. This Court will scarcely countenance a practice that, once adopted, will lead to similar applications to the one at bar in every case that may be certified, and upon which the Circuit Courts of Appeal shall request the determination of this Court, not upon questions of the *probative* effect of the evidence, but upon grave questions of law, such as those shown by the certi-

ficate in this case. The facts stated in the certificate are ample to inform this Court as to the controversy out of which the questions certified arise, and therefore the statement is sufficient and the motion should be denied.

VIII.

This case is not one in which an appeal or a writ of error would lie, under the act of Congress. It could only reach this Court by such a certification as has been made. Therefore it cannot be removed to this Court for the determination of the whole controversy by this indirect method. If the facts stated by the Judges in connection with the questions certified are sufficient to show the relevancy of the questions to the matters in controversy, it is not necessary for this Court to go further into the facts of the case.

IX.

Even admitting that the granting of this motion would establish the point for which appellants seem to desire it, namely, that the *execution and delivery* of the contracts between the parties took place in Tennessee, would that help their case? If not, the granting of the motion would serve no useful purpose. For example, in a recent case before the Circuit Court of Appeals for the Fifth Circuit, the notes and trust deed were *signed, acknowledged and delivered* (to the lender) in Tennessee; were payable in New York; the makers were residents and citizens of Tennessee, and the lenders of New York; yet in order to save the contract and enforce it as written, the Court held that the contract was made *in Mississippi*, merely because of an oral un-

derstanding arrived at in that State. The case cited is peculiarly strong, because the effort of complainants was merely to reduce the rate of interest from ten to six per cent., and the Mississippi statute provided that not more than six per cent. should be charged, unless there was an agreement *in writing* for more.

Glover *v.* Equitable Mortgage Co., 87 Fed. Rep., 518.

It seems manifest that the entire object of this motion is to have this Court review a question of fact. The Circuit Judge held that these contracts were made and entered into in New York.

Record, page 133.

That the Circuit Court of Appeals reached the same conclusion appears from the premises to the first and third questions certified. For the purpose of reviewing these findings of fact in the courts below it cannot be expected that this Court, in a case certified from a Circuit Court of Appeals, will direct the entire record to be brought up for its consideration.

X.

Appellants claim that the allowance of this motion will develop an admission by appellee that it was "doing business" in Tennessee. The actual admission is that "it was lawfully doing business in Tennessee" at the "times hereinafter named." This cannot help appellants' case. The Tennessee Supreme Court has several times held that each contract of a non-complying foreign corporation must stand alone; the fact that it may have been daily making unlawful contracts is of no importance in determining the validity of any particular contract.

Norton *v.* Trust Co. (Tenn.), 46 S. W. Rep., 544.

In the case just cited, two otherwise unreported decisions of the Supreme Court of Tennessee are reviewed at length upon this question.

XI.

A contract to pay money, borrowed of a building and loan association of a foreign State is one to be performed in such State when the borrower has his option to send such payments to the association in such State, or make them at a local office, so long as the association sees fit to maintain it with the understanding that the local agents are his agents.

Pollock *v.* Carolina B. & L. Asso. (So. Car.), 29 S. E. Rep., 77.

Under facts practically identical with those in the case at bar, the Supreme Court of Alabama holds the contract to have been *made* in the State of the corporate *situs* of the building and loan association.

Falls *v.* Building & Loan Asso., 97 Ala., 417; 13 So. Rep., 31.

A contract, although in violation of the laws of a given State, if not made in that State, and if valid where made, may be *enforced* in the courts of the State where, if made, it would have been invalid.

Zeltner *v.* Irving, 25 App. Div. (N. Y.), 228.

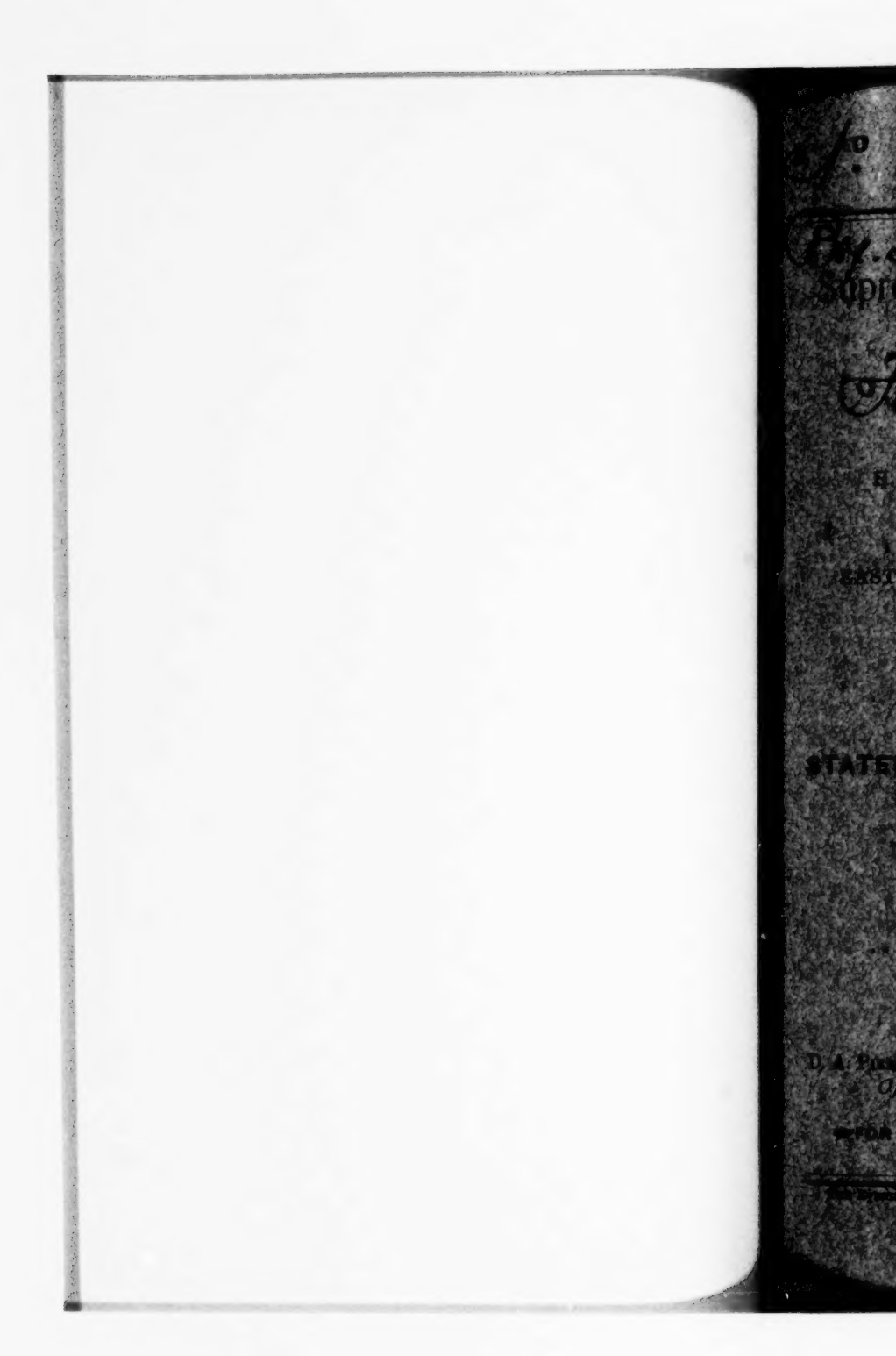
XII.

The motion under consideration is not accompanied by a certified copy of the record in the Circuit Court of Appeals, as required by Rule 37, § 2.

We have stipulated, as a matter of courtesy to opposing counsel, that a copy of the transcript from the Circuit Court to the Circuit Court of Appeals may be used in lieu of such certified record of the Circuit Court of Appeals, provided this be regarded by this court as a sufficient compliance with the rule in question. To us, however, it seems a question of grave doubt, which we reserved in making the stipulation, whether counsel can thus stipulate away a rule of Court the manifest purpose of which is to place this Court, at the very threshold of inquiry, in possession, not of the transcript from the Circuit Court, but of a complete copy of the record from the Circuit Court of Appeals, covering the case certified, and all orders entered in the progress of the case by the Circuit Court of Appeals itself. For the failure to comply with this requirement of the rule, we think that this motion must be denied, although, if the Court be satisfied with the transcript, concerning which the stipulation is made, we have no objection to the motion being determined on its merits upon the transcript mentioned. Upon the merits, however, for the reasons stated, and upon the authorities cited, we ask that appellants' motion be denied.

WM. HEPBURN RUSSELL,
WM. BEVERLY WINSLOW,
J. W. BUCHANAN,
H. DENT MINOR,
Counsel for Appellee.

BUCHANAN & MINOR,
Memphis, Tennessee.
RUSSELL & WINSLOW,
New York City,
Solicitors for Appellee.



Supreme Court of the United States,

OCTOBER TERM, 1900.

No. 153.

H. L. BEDFORD and LOU M. BEDFORD, his wife,
Appellants-Petitioners,

v.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, N. Y.,
Appellee.

(17,558.)

STATEMENT, BRIEF AND ARGUMENT FOR THE EASTERN BUILDING AND LOAN ASSOCIATION, APPELLEE.

Statement of the Case.

This is a suit in equity, which originated in the United States Circuit Court for the Western Division of the Western District of Tennessee, and in which the Eastern Building and Loan Association, appellee, as complainant, filed its bill against the appellants to recover from H. L. Bedford an indebtedness incurred under certain obligations which he had assumed as a stockholder in the Eastern Building and Loan Association, and to foreclose a mortgage upon certain real estate in the State of Tennes-

4 see, such mortgage having been executed by the appellants for the purpose of securing compliance with the obligations to the Eastern Building and Loan Association of H. L. Bedford as an "advanced" or borrowing member of the corporation.

From a decree of the United States Circuit Court in favor of the complainant in said bill an appeal was prosecuted by the appellants to the Circuit Court of Appeals for the Sixth Circuit. On the hearing of this appeal the Circuit Court of Appeals rendered no decree but certified the case to this Court under § 6, Clause 1 of the Act of March 3, 1891 (26 U. S. Statutes, 828, § 6, Cl. 1).

After the case had thus reached this Court, ap-
5 pellants petitioned for a writ of *certiorari* to have the entire record certified to this Court, which petition was granted, and, consequently, the complete record in the cause is now before this Court, which is called upon to "decide the whole matter in controversy in the same manner as if it had been brought" here "for review by writ of error or appeal."

Questions Certified.

The most important controversies presented by the record, and which this Court will be required to finally decide, are so admirably set forth in the questions certified and submitted for answer by the Cir-
6 cuit Court of Appeals for the Sixth Circuit that we restate them here. They are as follows:

"*First Question:* Was the validity of the notes signed in Tennessee by the maker, manually delivered by him to the soliciting agent of the association at Memphis to be transmitted to the association at Syracuse for the acceptance of the association at that place and payable at Syracuse, to be determined by the laws of Tennessee or of New York?

"*Second Question:* Was the validity of the mortgage executed and delivered under the same circum-

stances to be determined by the validity of the notes to which it was incident, or by the law of the State where the land lay which the mortgage conveyed and which upon default must be sold to pay the notes? 7

"*Third Question:* May a State by its laws forbidding the transaction of business within its borders annul the contracts of its citizens entered into and to be performed without the State, when those contracts are but the consummation of the inhibited business within the State, without an infraction of the Fourteenth Amendment to the Constitution of the United States? 8

"*Fourth Question:* Even if a State may by law refuse enforcement of such a contract in its Courts, should a Circuit Court of the United States sitting in the State refuse to enforce it when jurisdiction over the parties exists by reason of their diverse citizenship?" (Transcript, p. 133.)

Facts Certified.

The Judges of the Circuit Court of Appeals for the Sixth Circuit, in certifying the foregoing questions for answer, preceded the same by a statement of the facts shown by the record in the case in so far as they were deemed material to enable this Court to determine the questions of law so submitted. The statement of the case thus made by the Judges of the Circuit Court of Appeals so well presents the facts shown by the record at the same time setting forth the statutory provisions of Tennessee, out of which the controversies in this case arise, that we deem it proper to embrace in our statement of the case the facts as reported in that certificate to this Court. They are as follows: 9

"Before Taft and Lurton, circuit judges, and Thompson, district judge.

The Eastern Building and Loan Association of Syracuse, N. Y., is a corporation organized under the laws of the State of New York for the purpose and with the power of conducting a general building association business in New York and other States. Its plan of organization is similar to that generally adopted by such associations. Subscribers to its stock pay $1 initiation fee for each share of $100 and 75 cents per month as dues on each share and certain fines on default, and when the whole amount of dues and dividends paid in amount to $100, the holder is entitled to withdraw the same. Borrowing
11 members receive par value of their shares in advance and secure their compliance with requirements as to dues, fines and interest by mortgage or otherwise.

Prior to March 26, 1891, the association had a soliciting agent in Memphis, Tennessee, whose duty it was to solicit persons to become members of the association and to subscribe to its stock. The agent had no authority to accept applications for membership or subscriptions for stock but only the authority to transmit them by mail to the office of the company in Syracuse, New York, where they were accepted or rejected by the board of directors of the association. Three months after a person had subscribed for stock, and the stock had been issued to him, he
12 was, by the by-laws of the association, permitted to apply for an advance of the nominal par value of his shares or, in effect, a loan. This application was forwarded through the soliciting agent to the company at Syracuse together with the certificate of stock, already issued, as a pledge and a statement of the value of the property which it was proposed to mortgage to secure the loan. The application was accompanied by a recommendation of what was called "the local board" in regard to the wisdom of the loan. The local board consisted of certain stockholders of the association living at the applicant's

place of residence who had been elected by all the 13
resident stockholders, and whose duty it was to advise the association at Syracuse concerning the value of the property offered and the character of the applicant. The local board had officers, one of whom was a treasurer through whom members might, if they desired, forward payments due to the association at Syracuse, but the by-laws stated that in so doing the local treasurer was acting as agent for the stockholders and not for the association. Another by-law provided that all payments should be made to the secretary of the association at the home office in registered letter, express or money order or drafts.

On the second day of January, A. D. 1891, H. L. 14
Bedford, a resident and citizen of Shelby county, Tennessee, made the following application to the association which he delivered to its soliciting agent at Memphis to be forwarded to Syracuse:

O K. Sup't.	Cashier.	Stock.	A. F. 1, 26, '91. Recorded.	Indexed.	Filed.	Mailed.

46 shares. Number 4773.

Application for Shares in the Eastern Building and Loan Association of Syracuse, N. Y.

Agent, J. H. T. Martin. 15

I, H. L. Bedford, of Bailey, county of Shelby, State of Tennessee, No. of street or P. O. box —; occupation, farmer; hereby apply for membership in the Eastern Building and Loan Association of Syracuse, Onondaga county, New York, and subscribe for 46 shares of installment stock.

I hereby agree to abide by all the terms, conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association, and do also hereby, in order to facilitate the transaction of business of the Eastern Building and Loan Associa-

16 tion of Syracuse, N. Y., make, constitute and appoint the secretary of said association for me, in my name, place and stead, to appear and vote as my proxy upon any and all shares of stock at any time held by me, or standing in my name in said association during my absence, at any and all meetings of stockholders or directors and upon any and all matters which may properly come before any such meetings and attorneys, one or more under him, from time to time in writing to appoint, hereby authorizing, ratifying and confirming all that any said attorney, or his substitute, may do, or cause to be done as such proxy by virtue hereof. This proxy is not in any manner to affect my right to vote on
17 all such stock whenever I am personally present at any stockholders' meeting.

In witness whereof I have hereunto set my hand and affixed my seal this 2d day of Jan'y, A. D. 1891.

Signature of applicant,

H. L. BEDFORD. [SEAL.]

H. B. MARTIN, *Witness.*

The price of stock must accompany this application.

Endorsed.

Instructions to Agents.

This application should always be written in ink.
18 All blank places should be filled correctly and plain to avoid any chance of error in the home office. Be particularly careful to have the name of applicant written plain and spelled correctly, and where there appears any possible chance for misreading any word. Agents should use the space at the bottom of application for explanation. The admission fee must accompany the application before the stock can be written at the home office.

Send certificate of shares to:

Name, —— ——.

P. O., ——.

County, ——; State, ——.

On the 2d of February, 1891, the certificate of stock was issued by the association and sent to its soliciting agent at Memphis, who, a few days later, handed it to Bedford. The certificate was in the words following:

Series No. B 2. Maturing August 1st, 1897. Eastern Building and Loan Association of Syracuse, N. Y.

Certificate number 4773; number of shares, 46; amount, $4,600.

This certifies that H. L. Bedford, of Bailey, county of Shelby and State of Tennessee, is hereby constituted a shareholder of the Eastern Building and Loan Association of Syracuse, New York, incorporated under the laws of the State of New York, and holds forty-six shares therein of one hundred dollars each, and in consideration of the membership fee, together with agreement and statements contained in the application for membership in the association, and full compliance with the terms, conditions and by-laws printed on the front and back of this certificate, which are hereby referred to and made a part of this contract, and the said Eastern Building and Loan Association of Syracuse, New York, agree to pay said shareholder or his heirs, executors, administrators or assigns the sum of one hundred dollars for each of said shares at the end of seventy-eight months from the date hereof or in case of his death prior to the expiration of seventy-eight months, the association will pay the sum of all monthly installments paid on this certificate with interest at 6 per cent. per annum, payable in the manner and upon the conditions set forth in said terms, conditions and by-laws hereto attached. All payments under this certificate are payable at home office of the association at Syracuse, New York, within sixty days after the acceptance and approval of satisfactory proofs. This certificate of shares is issued to and accepted by the holder thereof upon the following express terms and conditions:

First. The shareholder agrees to pay or cause to be

paid a monthly installment of seventy-five cents on each share named in this contract, the same to be paid on or before the last Saturday of each month until such share matures or is withdrawn.

Second. If the shareholder shall fail to pay or cause to be paid any monthly installments on or before the last Saturday of each month, he shall pay a fine of ten cents per share for each and every month the payment may be in arrears.

Third. Stock in this association is non-forfeitable; but if a monthly payment on any share becomes past due and payable for a period of six months or more, such share shall be sold at auction for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines; the balance remaining after paying all accrued fines and monthly payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments it shall be bid in by the association and canceled, and the amount standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

Fourth. Members may withdraw their monthly installments at any time by first giving thirty days' notice, and will receive 6 per cent. annual interest on all shares of six months' standing and up to two years; the third year 7 per cent.; any time after the third year and before maturity 8 per cent.

Fifth. If a shareholder dies his personal representative may withdraw his shares at any time or continue on to maturity.

Sixth. At stated periods the profits arising from interest, premiums, fines and other sources, shall be apportioned among the shares in good standing.

Seventh. All payments must be paid to an authorized agent, or sent to the secretary at the home office by draft, express or money order, or registered letter. Individual drafts or checks not receivable.

Eighth. The association reserves the right at any

time to make an investigation in all cases prior to the approval of claims. 25

Ninth. The by-laws of this association, which are attached to and indorsed hereon, are a part of this contract and such by-laws and this certificate are to be construed together as part of the contract between the association and the shareholder.

Tenth. No shares shall be assignable or transferable on the books of the association, except by the shareholder paying a transfer fee of two dollars for entering the same, and upon consent of the association, indorsed thereon by the secretary after all dues and claims on the same have been paid.

Eleventh. It is agreed by all shareholders of this association that desire loans, that all money in the loan fund shall be sold at a uniform rate of ten per cent., bid as premiums on all loans. 26

Twelfth. No shareholder shall have any claim to any interest in the affairs, assets or funds of this association, nor the control of them, except as above specifically set forth, and assumes no further liability of any kind whatsoever except as hereafter described.

Thirteenth. In every case where this contract shall cease and determine, or become null and void, then all payments made thereon shall become forfeited to the association.

Fourteenth. Any action brought against this association shall be commenced within six months after filing proofs, and in the county of Onondaga, and State of New York. 27

Fifteenth. No agent has authority to change this contract in any way, and the association assumes no obligation for any statements not contained in its printed literature.

Given under the seal of said association at Syracuse, New York, the second day of Feb'y, A. D. 1891.

H. H. Loomis, *President.*

[L. S.] Jno. J. W. Reynolds,
Secretary and Gen'l Manager.

28 Attached to this were the by-laws of which only the following are deemed material:

Article I.

SECTION 3. The principal place of business of this association shall be located at Syracuse, N. Y., but the branches or agencies may be located and business done in any part of the State of New York, or in any other State or Territory of the United States where no legal prohibition exists, by authority of the board of directors, to be evidenced by a vote of a majority of the board, and spread upon its records.

Article IV.

29 SECTION 1. The annual meeting of the stockholders shall be held at the home office of the association on the second Monday of May of each year commencing with the year 1891, between 2 and 4 o'clock p. m., of which due notice shall be given according to law.

Article XIX.

Contract of members.

SECTION 1. The terms and conditions expressed in the certificate of stock, in connection with the application for membership and the by-laws of the association, form the contract between the association and each shareholder therein.

30 SEC. 16. All remittances for advance installments, premiums, monthly installments, fines and penalties, interest and premiums, and all other payments, shall be made to the secretary of the association at the home office, and in registered letter, express or money order or drafts. Individual checks shall not be received.

Article XVI.

Local boards.

SECTION 1. Whenever sufficient stock has been sold in any town to make it advisable the members residing in each town may organize a local board or

branch of the association. The officers of the local 31
organization shall consist of a board of from five to nine directors, from whose number shall be elected a president, secretary and treasurer (combined) and attorney; all of whom must be shareholders in the association; these officers shall hold office one year and until their successors are elected.

SEC. 2. The traveling agents of the association are given authority to appoint the first officers of the local board. Provided, however, that officers so appointed shall only hold office until the members of the local board meet and elect their successors.

SEC. 3. It shall be the duty of the officers of the local board to pass on all applications for loans which are received by the association from members resid- 32
ing in the town where such local board is located, and to protect the interest of the association in all practicable ways.

SEC. 4. Members may, if they so desire, make monthly payments on stock to the local treasurer. But such local treasurer shall be deemed to be the agent of the members, and not of the association.

SEC. 5. As soon as the officers of the local board have been appointed or elected, and the names of such officers have been certified to the association by a traveling agent or by the local secretary, a local board charter shall be issued to such board.

SEC. 6. The president of the local board shall call a meeting thereof whenever three members shall re- 33
quest him so to do.

On the 20th of March, 1891, Bedford made an application for a preference for an advance which was forwarded through the same soliciting agent to Syracuse. Bedford described in detail the real estate upon which he proposed to give the association a mortgage. This application was approved May 18, 1891, by the board of directors at Syracuse. Bedford then applied on June 20th for the loan in the letter following:

34 *Application for an Advance.*

To the board of directors of the Eastern Building and Loan Association of Syracuse, N. Y.

GENTLEMEN: At a regular meeting of your board, held May 18, 1891, having obtained the preference for an advance on forty-six shares of No. 4773 of your association, at a premium of ten per cent., I now respectfully request the advance be granted. I hereby agree to comply with the charter and by-laws of your association and all requirements defined by your committee of the board of directors.

H. L. BEDFORD,
Applicant.

35 Witness:
J. H. T. MARTIN.

This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby county, Tennessee, of the land in that county previously tendered as security. The mortgage had been duly recorded in Shelby county.

The defeasance clause of the mortgage was as follows:

"This grant is intended as security for the payment of the sum of fifty-six hundred, eighty three and $\frac{8}{100}$ dollars, the same being the principal, interest and premium of a loan from said association, which said loan was made pursuant to and accepted under the provisions of the by-laws of said association, and which said by-laws have been read by the mortgagor, H. L. Bedford, and are made a part of this contract, which said loan is evidenced and secured to be paid by seventy-eight (78) certain promissory notes of even date herewith, executed by the said H. L. Bedford, payable to the said association at its office in Syracuse as follows: One of each of said notes to be paid on or before the last Saturday of each and every month until all of said seventy-eight notes are fully paid, together with the inter-

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est, and each of said notes after maturity at the rate of six (6) per cent. per annum, payable semi-annually until said notes are fully paid. And the said mortgagor, H. L. Bedford, for himself and his heirs, executors, administrators and assigns hereby covenants and agrees with the party of the second part, its successors and assigns to pay said principal, interest and premiums at maturity and the interest accruing on said notes after maturity and all fines and penalties that may be imposed pursuant to the provisions of the constitution and by-laws of said association, and also to keep and perform all promises and engagements made and entered into with said association according to the true intent and meaning of its by-laws and articles of association, and also to keep the buildings erected and to be erected upon said premises insured against loss or damage by fire in an amount and in such manner and in such company as shall be most satisfactory to the party of the second part, its successors or assigns, so that the loss or losses, if any, shall be payable to it or them, and from time to time when taken out issued on said premises, which policies shall contain the best and most approved form of mortgage clause. And at once to make due proofs in case of loss and do all other things required, deliver over to it or them all policies and renewals thereof by said policies, and also pay and discharge when due and payable all taxes, assessments, rates and other charges now or hereafter levied or assessed upon said premises and remove all adverse claims, clouds and encumbrances, also that until full payment of the money hereby secured nothing shall be done or suffered whereby said premises shall be diminished in value or any of said policies of insurance affected or vitiated.

In case default shall be made in effecting such insurance or in paying, discharging or removing such taxes, assessments, rates, other charges, adverse claims, claims or encumbrances as aforesaid,

it shall be lawful for said second party, its successors or assigns, to effect such insurance and pay such taxes, assessments, rates, other charges, adverse claims, choses or encumbrances, and the amount so paid shall be a lien on said premises added to the amount secured by these presents and forthwith due and payable without demand, with interest, and may be collected in the same manner as the principal sum hereby secured. And it is hereby expressly agreed by and between the parties to these presents that if default be made in the payment of any one of said notes or any part thereof as herein provided or in case of waste or non-payment of the taxes, assessments or impositions on said premises, or in case of neglect or refusal to keep the premises insured as herein provided or in case the improvements thereon shall not be kept in good condition or repair, or in case of a breach of any of the covenants or agreements contained herein, or in case of failure to duly observe and keep the by-laws of the said association and in either or any of such cases, the whole of the said principal sum, interest, premiums, fines, dues and costs, shall at once become due and payable at the option of said association, its successors or assigns and it shall be lawful for said association or its successors or assigns at any time thereafter to sell the said premises hereby granted, or any part thereof, in the manner prescribed by law and out of the moneys arising from such sale to retain the amount due and unpaid for principal, interest, premiums, fines, dues and costs thereof, taxes, assessments, impositions, insurance and other advances, together with the costs and charges of making such sale, and the overplus, if any there be, shall be paid by the party making such sale on demand to the said H. L. Bedford, or his heirs or assigns. And this conveyance shall be void if full payment of the aforesaid moneys, with principal and interest, be made as hereinbefore specified, and if the aforesaid covenants and each of them be well and truly kept and performed as herein specified and provided."

The seventy notes were all of the same tenor, 43
mutatis mutandis, as the following:

On or before the last Saturday of June, 1893, I promise to pay seventy-two and 86-100 Dollars, $72 86-100, to the order of the Eastern Building and Loan Association at its office in Syracuse, N. Y. Value received. Bailey, Tenn., May 1, 1891.

H. L. BEDFORD.

The business of the association in Tennessee had been lawful down to March 26, 1891, when the following act was passed by the legislature of Ten- 44
nessee:

CHAPTER 122.

An act to amend chapter 31 of the Acts of 1877, declaring the terms on which foreign corporations organized for mining or manufacturing purposes may carry on their business and purchase, hold, and convey real and personal property in this State, so as to make the provisions of said act apply to all foreign corporations that may desire to own property or to do business in this State.

SECTION 1. Be it enacted by the General Assembly of the State of Tennessee, That chapter 31 of the 45
Acts of 1877 be so amended and enlarged as that the provisions of said act shall apply to all corporations chartered or organized under the laws of other States or countries for any purpose whatsoever which may desire to do any kind of business in this State.

SECTION 2. Be it further enacted, That each and every corporation created or organized under or by virtue of any government other than that of this State, for any purpose whatever, desiring to own

property or carry on business in this State of any kind or character, shall first file in the office of the secretary of the State a copy of its charter and cause an abstract of same to be recorded in the office of the register in each county in which such corporation desires or proposes to carry on its business or to acquire or own property, as now required by section 2 of chapter 31 of Acts of 1877.

SECTION 3. Be it further enacted, That it shall be unlawful for any foreign corporation to do or attempt to do any business or to own or to acquire any property in this State without having first complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than $100 nor more than $500, at the discretion of the jury trying the case.

SECTION 4. Be it further enacted, That when a corporation complies with the provisions of this act it shall then be, to all intents and purposes, a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of this State just as though it were created under the laws of this State.

SECTION 5.--Be it further enacted, That when such corporation has no agent in this State upon whom process may be served by any person bringing suit against such corporation, then it may be proceeded against by an attachment to be levied upon any property owned by the corporation, and publication, as in other attachment cases. But for the plaintiff to obtain an attachment he, his agent or attorney, need only make oath of the justness of his claim, that the defendant is a corporation organized under this act, and that it has no agent in the county where the property sought to be attached is situated upon whom process can be served.

SECTION 6. Be it further enacted, That said chapter 31 of the Acts of 1877, except in so far as the same is amended, enlarged and extended by this act, be and the same is declared to be in full force.

SECTION 7. Be it further enacted, That this act take effect from and after its passage, the public welfare requiring it. 49

Passed March 21, 1891.

THOMAS R. MYERS,
Speaker of the House of Representatives.
W. C. DISMUKES,
Speaker of the Senate.

Approved March 26, 1891.
JOHN P. BUCHANAN, *Governor.*

Upon the same date an act was passed concerning building associations. The part thereof relating to foreign building associations was as follows: (Chapter 2 of the Acts of 1891.) 50

SEC. 3. Be it further enacted, That no building and loan association organized under the laws of any other State, Territory or foreign government, shall do business in this State unless said association shall (deposit and continually thereafter) keep deposited in trust for all of its members and creditors, with some responsible trust company, or with some State officer of this or some other State of the United States, mortgages (or other securities) received by it in the usual course of its business amounting to not less than twenty five thousand ($25,000) dollars, nor more than fifty thousand ($50,000) dollars, at the discretion of the State treasurer. All of the personal obligations of its members taken in the ordinary course of business of such association, and secured on first mortgage on real estate, all dividends and interest which may accrue on securities held in trust, as aforesaid, by the trust company or the State, as provided herein, and all dues or monthly payments which may become payable on stock pledged as security for loans, the mortgages for which are on deposit in accordance with the provisions of this act, may be collected and retained by the association depositing such securities 51

or mortgages so long as such association remains solvent, and faithfully performs all contracts with its members. Any securities on deposit, as provided herein, may from time to time be withdrawn, if others of equal value are substituted therefor. Every building and loan association organized under the laws of any State, Territory or foreign government shall, before commencing to do business in this State,

First. File with the treasurer of this State a duly authenticated copy of its charter or articles of incorporation.

Second. File with the treasurer of this State the certificate of the proper State officer of another State, or the president and treasurer of some responsible trust company, certifying that it has on deposit securities, not less than $25,000, taken in the regular course of business, as mentioned in this act, in trust for all the members and creditors of such building and loan association.

Third. File with the State treasurer a duly authenticated copy of a resolution adopted by the board of directors of such association stipulating and agreeing that if any legal process affecting such association be served on said State treasurer, and a copy thereof be mailed, postage prepaid, by the party procuring the issuing of the same, or his attorney, to said association, addressed to its home office, then such service and mailing of such process shall have the same effect as personal service on said association of this State.

Fourth. Pay the State treasurer twenty-five ($25) dollars as fees for filing the papers mentioned in this section.

SECTION 7. Be it further enacted: No officer, director or agent of any foreign building and loan association shall, in this State, solicit subscriptions to the stock of such association, or sell, or knowingly cause to be sold or issued, to a resident of this State any stock of an association while said association has not on deposit securities as required by section 3 of

this act, or before said association has complied with all the provisions of this act. License to agents of such companies or associations shall be issued by the treasurer, annually, on the first of January, and said treasurer is authorized to collect from each agent for said license $2 fee. Any violation hereof shall be deemed a misdemeanor, and upon conviction shall be punished by a fine of not less than ten dollars, or more than fifty dollars. 55

The association filed its charter with the secretary of state of Tennessee on the 11th day of August, 1893, and filed an abstract of the same in the office of the register of Shelby county on August 15, 1893. 56
The association did not comply with the building association laws quoted above in any respect

There is no evidence that the association solicited stock subscriptions after March 26, 1891, but it does appear that it made several loans of the same kind as the Bedford loan upon stock already subscribed for, after that date.

The supreme court of Tennessee has decided that notes and a mortgage executed under similar circumstances, and made payable in Minnesota, are Minnesota contracts, but that they are, nevertheless, void in Tennessee, and cannot be enforced in the courts of Tennessee. United States Savings & Loan Company *v.* Miller, 47 Southwestern Rep., 17, affirmed on appeal by supreme court, December 18, 1897, without written opinion. 57

Bedford defaulted in his payments on the notes, and the association filed a bill in equity in the circuit court of the United States for the western district of Tennessee to foreclose the mortgage and collect the amount due under his contract. The defendant, Bedford, answered, averring that the notes and mortgage were in violation of the above-quoted laws of Tennessee, and were void, and could not be enforced. (Transcript, p. 122, fol. 155, to p. 133).

58 Such are the facts of this case as understood by the Judges of the Circuit Court of Appeals for the Sixth Circuit, and by them certified to this Court.

The Opinion of Judge Hammond.

Upon the hearing of this case in the United States Circuit Court for the Western Division of the Western District of Tennessee, the Hon. E. S. Hammond, District Judge, presiding upon the hearing, in deciding the case for the complainant, made a very full statement of the facts and then delivered an opinion reviewing at length the questions in con-
59 troversy in that court and now brought to this court for final determination. It will, perhaps, serve the convenience of the Court to have us here embody Judge Hammond's statement of the case and his opinion based upon the facts as he understood them. Such statement and opinion are as follows:

Circuit Court of the United States for the Western Division of the Western District of Tennessee.

EASTERN BUILDING AND LOAN ASSOCIATION
vs.
H. L. BEDFORD and WIFE. } In Equity.

60 Bill to foreclose a mortgage.

Opinion. Filed June 4, 1898.

By an act of the legislature of the State of Tennessee of March 28th, 1891, ch. 2, entitled "An act to regulate the business of building and loan associations" it was required that no building and loan association, organized under the laws of another State should do business in Tennessee unless said association should deposit and continually thereafter keep deposited in trust for all its members and creditors, mortgages amounting to not less than twenty-five thousand dollars or more than fifty thousand

dollars, at the discretion of the treasurer. They 61
were also required before commencing to do business to file with the treasurer of the State a duly authenticated copy of their charter or articles of incorporation and a certificate of deposit of the valid securities required.

By another section the officers, directors or agents of foreign building and loan associations were forbidden to solicit subscriptions to their stock in that State or to sell or knowingly cause to be issued to a resident of the State any stock of the association unless a deposit had been made in accordance with the terms of the act, and it had otherwise complied with its provisions. Agents were required to be licensed by the treasurer, for which they were to 62
pay a fee of two dollars, and he was also to receive a fee of twenty-five dollars for filing the papers mentioned in the act. Any violation of the prohibition against the sale of stock without a compliance with the act was made a misdemeanor, and punished as such by fixed penalties.

By another act of March 17th, 1891 (ch. 95), chapter 31 of the Acts of the Legislature of Tennessee for the Year 1877, being sections 1992 to 2063 of Milliken & Vertrees Code, was amended so as to apply that act to corporations, chartered under the laws of other States, known as building and loan associations and other specifically enumerated corporations. 63

The act of 1877, carried into Milliken & Vertrees Code, was an act for the encouragement of mining and manufacturing corporations, which were required, if desiring to carry on their business in this State to file in the office of the secretary of state a copy of their charters or articles of incorporation, and such corporations were to be deemed and taken to be corporations of this State subject to its jurisdiction, to sue and be sued therein in the mode and manner directed by law in the case of corporations created and organized within the State. Then the act conferred the privilege of acquiring and holding

64 real property, which was made liable for its debts. The act gave resident creditors priority. Taxation was regulated. Rights of way were given for the maintenance of roads, bridges, canals, tramways, telegraph lines, etc.; but they were required to begin business within a year, it being declaredto be the object of that act to secure the opening and development of the mineral resources of the State, to facilitate the introduction of foreign capital, etc.; and such corporations were authorized to establish villages and settlements for the use and residence of its employés and others; and the sale of liquor was prohibited within a radius of five miles of such village and settlements.

65 Subsequently, by an act of March 26, 1891, ch. 122, this act, ch. 31, 1877, was extended to all corporations chartered or organized under the laws of other States or countries for any purpose whatsoever, which may desire to do any kind of business within the State of Tennessee. This last act further required that a copy of the charter should be filed with the secretary of state and an abstract thereof, in every county in which a foreign corporation desired to do business. And then, by section 3, it was enacted that—

"It shall be unlawful for any foreign corporation to do or attempt to do any business or own or acquire any property in this State without first hav-
66 ing complied with the provisions of this act, and a violation of this statute shall subject the offender to a fine of not less than one hundred dollars, nor more than five hundred dollars, at the discretion of the jury trying the case."

And, by section 4 when the corporation had complied with the provisions of the act it should be to all intents and purposes a domestic corporation of the State, and if it had no agent in the State upon whom process could be served it was liable to attachment, to be levied upon any property owned by the corporation. The last section of the act re-

enacted the provisions of chapter 31 of the Acts of 67
1877, thus extending all the privileges of that original act to all corporations whatever, coming into the State to do business.

The plaintiff is a building and loan association of the State of New York, having its location at the city of Syracuse, which has never complied or attempted to comply, except as hereinafter stated, with any of the foregoing acts nor with a subsequent act known in the legislation of the State as the "curative act" of May 10th, 1895, chap. 119, which authorized corporations that had been doing business in the State contrary to the provisions of the former act, to file their charters as required, and be relieved of the penalties and forfeitures in- 68
curred, but with the important provision that no suit should be instituted upon any contract thus made valid until after two years from the passage of the act.

By the charter of the plaintiff company it was authorized to establish a local board anywhere, to be composed of its members in that locality to assist in carrying on its business, it being a mutual company. It had a firm of agents in Memphis, Shelby county, Tennessee, and also a local board, composed of members thereabouts. On the 23rd day of January, 1891, before the passage of any of the foregoing acts, except that of 1877, the defendant signed in Shelby county, Tennessee, a written ap- 69
plication for shares in the plaintiff association in the form prescribed for the purpose, and customary in doing its business. This application was forwarded by mail through the above agents to the plaintiff company, at its home office in Syracuse, New York. The application was granted by the board of directors at the home office, and on February 2nd, 1891, a certificate for forty-six shares of the stock, amounting to forty-six hundred dollars, was issued to the defendant, being sent to him by mail through the Memphis agents. According to the scheme of the company this stock was to mature by the payment

70 of its dues and assessments on the first of August, 1891. These dues and assessments were payable at its home office, in Syracuse, N. Y., but a by-law authorized them to be paid to the local board or agent where the stockholder resided, if the stockholder so desired.

On March 20th, 1891, the defendant made a written application for a loan, which, according to the custom of the company, was sworn to, and appraisers appointed by the local board indorsed on the application a sworn appraisement of the property which was offered as security. In this application for a loan of forty-six hundred dollars for six and a half years, it was stated that the loan was
71 to bear interest at the rate of 5 per cent. per annum and a premium of 5 per cent. per annum payable annually on or before the last Saturday of each month, "all payments to be made as the lender may direct," and to secure the same the defendant agreed to give a mortgage upon the property offered as security. This application and appraisement, like the application for stock, was sent by the agents through the mail to the home office, at Syracuse, New York; and on the 18th of May, 1891, the board of directors at Syracuse, in the State of New York, recommended and approved the loan. Subsequently, Bedford made a written application, again sent through the mails, for what is called "an
72 advance of loan," and referred to the resolution of the board of directors of May 18th, 1891, allowing the advance at "a premium of ten per cent.," attached to which written application was the affidavit of one of the agents, which was again forwarded to the board of directors by mail. The defendant and his wife then executed a mortgage upon real estate situated in Shelby county, Tenn., dated May 1st, 1891, duly and properly acknowledged June 18th, 1891, filed for record June 20th, 1891, and duly recorded in the register's office of Shelby county. This mortgage acknowledged the receipt of forty-six hundred dol-

lars and secured the sum of $5,683.08, the same 73
being the principal, interest and premium of the loan, evidenced by seventy-eight notes, dated Memphis, Tenn., May 1st, 1891, payable to said association at its office, in Syracuse, monthly." Having signed these notes at Memphis and recorded this mortgage, they were again forwarded by these agents, through the mail, to the home office, in the city of Syracuse, New York, and, thereupon the plaintiff company drew its draft on the Bank of Onondaga, at Syracuse, N. Y., in favor of the defendant, for the sum of $4,140, which, in due course of business was paid to him, or to his order, at Syracuse, New York. The shares of stock were withdrawn, duly receipted for, according to the customary method of doing 74
business.

The plaintiff company filed a copy of its charter with the secretary of state, on August 11th, 1893, and an abstract thereof in Shelby county, on August 15th, 1893, more than two years after the completion of this transaction, and before the passage of the curative act. The seventy-eight notes executed were all dated May 1st, 1891. Each was for $72.86, except the last three, which were each for the sum of $38.36. They were all payable to the order of the plaintiff company at its office, in Syracuse, New York, the first on or before the last Saturday of May, 1891, and each successive one on the last Saturday of every month thereafter up to and 75
including the last Saturday of November, 1897. These notes represented the amount of dues estimated to mature and become payable on the shares of stock which the defendant held until the same should mature and reach their par value from the payment of the dues, together with the earnings thereon and the interest and premium advance during that period. The shares of stock were also pledged as collateral security in addition to the mortgage.

The mortgage itself contained stipulations to pay the principal, interest and premiums, and to conform

76 to the constitution and by laws of the order, pay the fines and penalties prescribed thereby according to the true intent and meaning of the articles of association, keep the buildings on the premises insured against loss by fire, to pay all taxes, and to perform all other necessary things relative to said premises, which were imposed by the contract and by-laws of the association. The defendant further agreed to pay the monthly installment dues of seventy-five cents on each share. There was also a provision that if he should fail to pay any of the notes, shares or dues, the whole should become fully due and payable; that the shares of stock should be forfeited and the mortgage and contract should be immedi-
77 ately enforced.

The notes were all paid up to and including the last Saturday of June, 1893, since which time none of the notes, assessments, or dues have been paid.

This bill was filed to enforce the contract and foreclose the mortgage, on the 24th of June, 1895, a little more than thirty days after the passage of the curative act, and before the two years limitation thereof had expired.

HAMMOND, *J.* (after stating the facts as above):

The defense in this case is without a particle of merit, the defendant having received nearly five
78 thousand dollars of the plaintiff's money upon a loan secured by a mortgage upon his property in the ordinary way of such transactions. There is no reason why he should not pay the money back and no defence is offered except that the plaintiff being a foreign corporation had no right to make the loan until it had complied with certain administrative rules and regulations of the State of Tennessee concerning foreign corporations.

Naturally, repudiation of a debt admitted to be just, finds its protest at the bar from the plaintiff's counsel. That protest also must find response in judicial judgment, unless the courts are compelled

to sustain the defense upon some inexorable princi- 79
ple of law having its only justification in the maxim, *ita lex scripta est.*

For my part, I am not prepared to concede to State legislation that unrestrained absolutism of power over foreign corporations which is being built up by the usurpation and enlargement of the recognized right to regulate foreign corporations doing business in the State. Those corporations are not outlaws from all constitutional protection, because of this power to regulate them, nor because of a power to prohibit them from doing business in the State. That power of regulation or prohibition does not necessarily mean a power to forbid their home contracts with citizens of the foreign State and about 80
property in that State. It is not more imperious than the equally vaunted police power of a State which it was said by the Supreme Court "cannot be put forward as an excuse for oppressive and unjust legislation." Per Mr. Justice Brown, in Holden *v.* Hardy (Feb. 28, '98), 169 U. S., 366, 392; Davidson *v.* New Orleans, 96 U. S., 97; Yickwo *v.* Hopkins, 118 U. S., 356. And, as in the case of the police power, this exaggerated claim of absolute power over foreign corporations has received its check, first in the dissenting opinion in Hooper *v.* California, 155 U. S., 648, 657, and now in the judgment of the full court in Allgeyer *v.* Louisiana, 165 U. S., 578, and that, too, in relation to legislation similar to that set 81
up by this defense. What may be called the constitutional freedom of trade or right of contract as against such legislation has been fully sustained by the latest of these decisions both as against the police power, where the public health, morals or safety is not involved, and this power to regulate or prohibit the business of foreign corporations. "The question in each case," says Mr. Justice Brown, in Holden *v.* Hardy, *supra*, "is whether the legislature has adopted the statute in exercise of a reasonable discretion or whether its action be a mere excuse for

82 an unjust discrimination, or the oppression, or spoliation of a particular class."

When asked what public policy was at the back of the legislation of 1891, forbidding foreign corporations to do business in the State without having first registered their charters in every county in the State in which they proposed to do business and acquire property, counsel for the defendant replied that it was to prevent irresponsible corporations from getting a footing in the State and to advise the people as to the charter rights and privileges of the companies.

Plainly this is only administrative in its character, and is in no sense at all a policy which affects the
83 health, morals or general safety of the public, and, as applied to a contract like that we have under consideration there is no effect of the policy that in any sense disparages the contract. It is as harmless as it was before and in the nature of the public policy there is nothing to invoke that kind of protection which usually falls within the police power; and it is somewhat misleading, therefore, to attack the contract as being against public policy. The statute makes no distinction between responsible and irresponsible companies. Either may establish themselves by registering their charters.

As to the matter of information the defense has rather a flimsy foundation, for it is far more likely
84 that any one dealing with the corporation would depend upon the abundantly printed and circulated forms of the charter which in this day of cheap printing and rapid communication is all sufficient for the purposes of information, without the trouble of going to the county-seat to inspect the records. There does not seem to be much in this suggestion to invoke the principle of public safety or even the public welfare as a foundation for the policy stated. It is not to be presumed that the object of the legislature was to make repudiation easy by furnishing a defense like this to the vast number of people who have resorted to the loan and mortgage companies

to borrow money which they could not get at home and could get abroad at cheaper rates. Possibly the oft-reiterated charge that the real purpose of the legislation was to make fees for the registration officers in the different counties may furnish a clue to the kind of public policy which is the foundation of the legislation; but evidently, forfeitures of contracts are not to be enforced by the courts in aid of a public policy like that unless it must be done in loyal obedience to the command of the legislature. Certainly, however, it does not fall within the class of cases mentioned by Mr. Justice Brown in Holden *v.* Hardy, where the legislature may impose limitations upon the right of contract to prevent detriment to the well-being and safety of the people or their property. It cannot be denied, nevertheless, that the legislature of Tennessee had the right, and the courts must enforce it, to require foreign corporations to comply with these regulations and might affix any pains and penalties for that purpose which the legislature might choose—and that has been done by this act; so that if we had the malefactors against its prohibitions, and this were a case to enforce those penalties as in Hooper *v.* California, *supra*, we might be compelled to do it.

But when it is claimed that this act makes the contract between the borrower and the lender void or non-enforceable in the courts, it is another matter, which requires the strictest scrutiny before such a penalty can be invoked against the natural justice and the greater public policy of encouraging the enforcement of fair contracts and compelling borrowers to repay the money which they have borrowed.

It seemed to be conceded in the argument by the plaintiff's counsel that the supreme court of Tennessee does not recognize any distinction between statutes which in their terms declare that a contract shall be void as one of the penalties imposed, and those which do no more than prohibit the doing of a thing and impose a penalty; and that by our Ten-

88 nessee law if the thing is prohibited any contract concerning it is void without any explicit declaration of the statute to that effect, and without reference to the fact whether the statute imposes other penalties or not. Stephenson *v.* Ewing, 87 Tenn., 46; State *v.* Insurance Co., 92 Tenn., 420; Haywortb *v.* Montgomery, 91 Tenn., 16; Anderson *v.* R. R. Company, 91 Tenn., 46; R. R. Company *v.* Evans, 66 F. R., 809.

It is not necessary in this case to go into a critical examination of the Tennessee cases to determine whether or not they go to the extent of declaring the contract void or only to that of declaring that the courts of Tennessee will not enforce them,
89 which, be it remembered, are two distinct results, the difference being all-important. If the contracts be void they should not be enforced anywhere, but if there be only a prohibition on the courts of the the State from enforcing them they might be enforced elsewhere; and as well probably in the Federal courts sitting in the State of Tennessee, which are not subject to the prohibitions of the Tennessee legislature relating to the State courts. We are relieved from any considerations like these from the fact that this contract, in our judgment, was one over which the State of Tennessee had no power whatever, except possibly to deny its enforcement by the courts of Tennessee, though that is very doubtful.

90 This was a New York contract; made in New York, to be performed there, and not in any sense a Tennessee contract. The making of such a contract is not doing business in Tennessee and does not fall within the prohibitions of the statute. Essentially, it is not different in respect of this from the contract in the case of Allgeyer *v.* Louisiana, *supra*, 165 U. S., 578; nor Pioneer Savings Co. *v.* Cannon, 96 Tenn., 599; nor Lauter *v.* Jarvis-Conklin Mortgage Co., 85 F. R., 894; nor Cæsar *v.* Cappell, 83 F. R., 403; nor Jarvis-Conklin Mortgage Co. *v.* Wilhoit, 84 F. R., 514.

It is contended that the case of New York National

Building and Loan Association *v.* Cannon (Knox- 91
ville, Sept., 1897), 41 S. W. R., 1054, —Tenn.—has authoritatively settled that the contract is void and that the Federal courts are bound by that decision. It does not appear from the report of that case whether the notes were payable in New York or Tennessee, though an inference that they were payable in New York is insisted upon by counsel for the defendant. It is true that in that case it was decided that the building and loan association was doing business in Tennessee contrary to the prohibitions of the statute, citing Lumber Co. *v.* Thomas, 92 Tenn., 589; Manufacturing Co. *v.* Gordon, 93 Tenn , 597. But it is to be particularly noted that the court does not decide 92
that the contract was void no matter whether it was a New York or a Tennessee contract, but only that "the court of chancery appeals was correct in holding that the contract was illegal, and could not be enforced by the court and in refusing to foreclose the mortgage of the building and loan association." If that be true of the Tennessee State courts it is not necessarily true of the Federal courts, as before intimated. It is a familiar principle that the Federal courts do not follow the penal statutes, imposing penalties of prohibition that relate only to matters of procedure and practice or to matters of jurisdiction. The legislature of a State cannot shut up the Federal courts nor deny parties access thereto. 93
They may prescribe rules of property and declare contracts within their jurisdiction null and void, and thereupon the Federal courts will enforce the rules of property and refuse to enforce the void contracts; but if the legislature leaves the contract valid, enabling parties to enforce it within jurisdictions that are not amenable to the legislature of the State of Tennessee, I see no reason why the Federal courts may not enforce such contracts, although their enforcement is prohibited to the courts of the State.

This is not, however, to be misunderstood as applying to those cases where the legislation is the ex-

94 ercise of a police power, which fixes a public policy that appertains to the health, morals or safety of the State, to use again the language of Mr. Justice Brown in the case above cited. That class of cases is very near akin to those constituting rules of property. At all events the Federal courts will not enforce contracts that are vicious because they are contrary to the declared will of the legislature exercising that care for the health, morals or safety of the public, to which we have adverted. But it does not follow from this that they will refuse to enforce valid contracts that are harmless in themselves and non-enforceable in the State courts, only because they are not in conformity to certain prescribed
95 preliminary rules and regulations of an administrative character necessary to be complied with before suit can be brought upon them in the State courts. I do not stop to support this enunciation by the citation of authorities for the reason that it is not depended upon in favor of this judgment.

Whatever respect we may and should have for the adjudications of the supreme court of Tennessee in construing State statutes, it is not imperative that we shall follow a decision which is contrary to our own Federal decisions above cited, and one which has been made long after this contract was entered into and after the rights of the parties therein had fully attached. In such cases it is open to us to fol-
96 low our own decisions and exercise our own independent judgment as to the validity of these statutes.

The rule on this subject is nowhere so well expressed as in the case of Louisville Trust Co. *v.* City of Cincinnati, 76 F. R., 296, in which case Judge Lurton was careful to collate the cases on the subject and to declare the correct rule for our guidance. Burgess *v.* Seligman, 107 U. S., 20.

Another observation upon the case of The New York B. and L. Ass'n *v.* Cannon, *supra*, is worthy to be noted here, and that is that although the contract was declared illegal and not enforceable in the

State of Tennessee, the result was so shocking to 97
the sense of justice of that court that it resorted to
the well-known principle that one asking equitable
relief must himself do equity and compelled the
debtor to repay the money borrowed out of the funds
realized by the sale of the property, notwithstanding
the so-called illegality of the contract, thereby sub-
stantially enforcing it, notwithstanding the prohi-
bitions of the statute.

But conceding all that may be claimed for that
case, and admitting that it is a fair inference from
the statement of facts that that contract like this
was to be performed in the State of New York and
not in the State of Tennessee, the final and all-suffi-
cient answer to it is that if the supreme court of 98
Tennessee has properly construed the statute, it is,
in our judgment, declared unconstitutional by the
Supreme Court of the United States in the above-
cited case of Allgeyer *v.* Louisiana, 165 U. S., 578,
just as a similar statute of Louisiana similarly con-
strued by the Supreme Court of that State was de-
clared unconstitutional.

In Caesar *v.* Cappell, *supra*, this court had occa-
sion to examine the authorities upon which the rul-
ing is based that a promissory note payable in the
State of New York is a New York contract to which
the giving of a mortgage in Tennessee is only an in-
cident and not a part of the contract, and it is only
necessary to refer to the reasoning and treatment of 99
the cases found in that opinion. I adhere to that
opinion, and hold that the facts in this case which
are not unlike the facts in that case, do not change
the rule there laid down. It is true that there is
much more ground on the facts of this case for the
contention that the business was done in Tennessee
than there was in the case of Allgeyer, above cited,
but this is only a superficial view of the subject. In
the Allgeyer case the property insured was in the
State of Louisiana; the owner making the contract
of insurance was in Louisiana; that which he did to
put the contract into being was done in Louisiana,

100 by writing and depositing a letter in the post office at New Orleans. The agency which he used in his business was the telegraph and its operators or the post office and its officials. They were all in Louisiana and necessary agencies in the completion of the contract, and yet it was held that this was not doing business in the State of Louisiana because the contract was to be performed in New York, the premiums were to be paid there, the losses, if any, were to be paid there, which made it a New York contract, and the Supreme Court say that if the supreme court of Louisiana was correct in holding that the Louisiana statute forbade the doing of those things in Louisiana because the company had not complied
101 with statutes of prohibition similar to this we have in this case, the statute was in violation of the fourteenth amendment to the Federal Constitution by depriving the parties of their liberty without due process of law—that is to say, the freedom to make a contract of insurance to be performed in the State of New York.

We must not be misled by the suggestion of counsel for the plaintiffs that in the Allgeyer case it was especially noted that the defendant had no agent in Louisiana, thereby inferring that if the company had had an agent in Louisiana the decision would have been otherwise. That is a mistaken reading of the case. The constitution of Louisiana
102 contained a provision that no foreign corporation should do business in the State without having one or more known places of business and an authorized agent or agents in the State upon whom process might be served, and the court adverted to the fact that there was no known place of business and no agent in the State as a circumstance to show that the company was not doing business in the State and as an indication of what was meant by that phraseology in the legislation then under consideration. It is not at all to be inferred from this that if the insurance company had made this contract through the agency of some solicitor who performed

the function of mailing the correspondence by 103
which it was effectuated instead of that correspondence being mailed by the insured himself, the decision would have been otherwise than it was, and that is all the difference there is in this case. There, Allgeyer wrote and mailed his own letters which were necessary to complete the contract. Here, defendants' application and subsequent acceptance were also transmitted through the mails albeit by the instrumentality of his own agents or fellow-members of the building and loan association acting in the city of Memphis. These were only his messengers or agents, to put his letters in the mails.

The essential facts are that he applied in the State of New York by mail for a loan and the acceptance 104
of his offer was had in the State of New York and transmitted to him by mail through the same agents as before. The contract was that he would pay the money, principal and interest, in New York, which made it a New York contract, and the fact that the debtor gave him the privilege of paying it here in Memphis if he chose to do so, does not at all affect that circumstance. The most that can be said upon the facts of this case is that the preliminary negotiations for the contract took place in Tennessee. It may be that the agents through whom they were carried on were, in the sense of the Tennessee statute as to those negotiations, doing business in that State contrary to the statute; and 105
it may be that the Supreme Court will refuse to hold that the fourteenth amendment protects the defendant in his right to borrow money in the State of New York, and to mortgage his Tennessee land as security for it if he does the business through such agencies; and may confine that valuable constitutional protection to the bare use of the mails, but I do not see why any such distinction should be made. If it be a sound distinction the utmost that can be claimed is that the preliminary negotiations themselves were illegal and subjected the offending parties to the penalties of the statute, as in Hooper

106 *v.* California, *supra*, but this does not change the ultimate fact that the defendant here and plaintiff there entered into a contract in the city of Syracuse, New York, for the loan of the money and the mortgage of the property. It was there in Syracuse that their minds came together through whatever agencies may have been used for that purpose, and the contract of lending or borrowing and mortgaging was done in the city of Syracuse, New York, and not in the city of Memphis and therefore the statute of Tennessee has no application to it. That part of the business was not done in Tennessee, and it is only that part with which we are dealing in this case.

107 I understand the case of Allgeyer *v.* Louisiana to settle that it is not within the competency of the legislature to prohibit a citizen of Tennessee from borrowing money in New York from a citizen of New York and giving a mortgage upon his property in Tennessee to secure it and the fact that the lender is a New York corporation does not at all alter the right both of the defendant to make the contract of borrowing and of the corporation in New York to make the contract of lending, according to its capacities in that State. The law of New York is the *lex loci contractus* in such cases and not that of the State where the borrower resides. That is both the business and the legal status of the transaction.

108 It is only a question of how the parties shall get together to make their contract. It seems to me quite preposterous to say, as was suggested in the argument, that the borrower must physically leave the State of Tennessee and be physically present in the State of New York in order to make such a contract valid. It seems to be agreed by the defendant's counsel that if such physical presence in New York had occurred, this contract could be enforced. It is decided in Allgeyer's case that it can be enforced if the contract is made through the agency of the mails, that it to say, through the functions of the postmasters.

I suppose it would be agreed that if the defendant had made the same contract through the agency of the express company that it would not have been illegal; or if he had put a messenger on the cars and sent him with a power of attorney to the city of New York, it would not have been illegal. Now why is it any more illegal to negotiate through persons in Tennessee who are willing to take the burden of attending to the details and transmitting their correspondence through the mails? For my part I do not see any distinction that can be fairly drawn, upon the circumstances, between the two cases. 109

We have, then, the broad principle, that a contract of borrowing and lending to be performed in the State of New York is the doing of that business within the State of New York, and not within the State of Tennessee, no matter how or what agencies are used for the purpose, and no matter what punishments may be inflicted upon those who dare to accept such agencies within the State of Tennessee. 110

And, moreover, we have in the Allgeyer case the broad principle that the right of the citizen of Tennessee to make such a contract of borrowing and of the New York corporation, such contract of lending, cannot be prohibited by the legislature of the State of Tennessee; and it is a misapplication of the power of the State of Tennessee over foreign corporations to assume that it can exercise any such prohibitions upon the freedom of contracts. The whole argument in behalf of this defense, proceeds upon the false assumption, in my judgment, that it was a contract made within the State of Tennessee. 111

It may be that this will very much narrow and limit the operation of this act of Tennessee, but I cannot see that that is any objection to the ruling here made. It may be that if the foreign corporations can thus "do business" in Tennessee, we emasculate the power of the State of Tennessee to prevent their "doing business" in that State; but all this is a mere play upon the words, as the only

112 effect of the ruling is to confine the power of the State to that class of prohibitions which prevent the foreign companies from becoming, *pro hac*, Tennessee corporations. That is the privilege given them by the original statute, and all the later statutes that if they will comply with their provisions they shall in effect, become domestic corporations. Indeed the conception of the original statute is one of encouragement and indulgence, and not prohibition; and the fallacy of the defense is that unless they become domestic corporations they shall not be allowed to make contracts with the citizens of Tennessee at all. How far they may go in that direction we need not decide, but we have now the
113 authority of the Supreme Court of the United States for saying that the legislature cannot go to the extent of prohibiting the making of a contract to be performed in the State of New York. There is no anomaly in this position, for, in the former opinion upon this question I cited the case of a Scottish railroad company which built its tracks within the territory of England, ran its traffic trains every day over that territory, kept its station houses and station agents there, and yet that was held not to be "doing business" within the territory of England. Cæsar *v.* Cappell, *supra*. Hazleton *v.* Miss. Valley Ins. Co., 55 Fed. R., 743, 750.

Reference has been made in the argument to a
114 Tennessee process act, chap. 226, of March 29, 1887, defining, for the purpose of serving process in suits brought against foreign corporations in Tennessee, what is to be, in the purview of that act, held to be "doing business" within the State. That is a special statutory definition for a special purpose and cannot be perverted to the purposes of an interpretation of another act where only a similar phraseology is used for an entirely different purpose. The truth is this phrase "doing business" within the State or "engaged in business" within the State is of such an indefinite and uncertain meaning, so vague and ambiguous, so elastic in its quality, that an act of

the legislature which uses it without defining it is almost nugatory for want of certainty as to its meaning; and following the well-known and cardinal rules of construction such phraseology will not be construed by the courts to prohibit harmless contracts, or to secure formidable forfeitures upon the mere literalism of the words used. If one should undertake to define the phrase by specific or particular designations of the things prohibited, he might be expected to encounter difficulties in doing what penal acts should do in respect of explicit definitions of the offenses created; and as well some lack of power to extend the prohibitions beyond the territorial limits of the State. It is not possible to build a Chinese wall around a State, so that a citizen of it shall make no contracts with a foreign corporation except by permission of the State. The Allgeyer case settles that the mail at least will break through such a prohibitory contrivance. 115 116

The defense of usury is untenable. The contract is not usurious under the laws of the State of New York, and in that respect the case certainly is governed by the above-cited case of Pioneer Savings Co. *v.* Cannon, 96 Tenn., 599, which holds that the usury laws of Tennessee can have no extra-territorial effect. It has always seemed to me that that case also is almost a direct judgment in favor of the ruling here that this was a New York contract. It decided under very similar circumstances that it was a Minnesota contract and therefore not subject to the usury penalties of the Tennessee statutes. If it was a Minnesota contract for the purposes of usury it was a Minnesota contract for the purposes of the prohibitions of the act 1891. 117

This view of the case makes it unnecessary to consider the contention of the plaintiff that the defendant is estopped to contest the validity of the contract, upon the ground that he is himself *particeps criminis* and acting in violation of whatever State law there may have been; that he is taking advantage of his own wrong and his own turpitude as a

118 violation of the statute as a defense to a debt voluntarily contracted and for which he has received full consideration. Also, upon the ground that having received and used plaintiff's money with full knowledge, necessarily implied, if not actually existing, of the plaintiff's alleged incapacity to contract in Tennessee, he is estopped to set up that incapacity as a defense upon much the same ground that one who deals with a corporation is estopped to deny the corporate character of the party with whom he deals. And, lastly, that the defendant was himself a member of this company at the time the act was passed, at the time he solicited the loan and at the time he made the contract; that it was a mutual company
119 for which he is as much responsible as the other members and therefore he will not be allowed to set up that its contract was illegal and void, but must leave it to the State to enforce whatever penalties and forfeitures may arise to him and his fellows because of his own illegal conduct, in joining a mutual company acting in the State in violation of the law, or what is the same thing remaining in the company after the act was passed.

It is possible that this is a good defense, but we need not decide the point. Gold Mining Co. *v.* National, etc., Bank, 96 U. S., 640, was a case where a defendant sued by a national bank which had loaned him money was not allowed to plead as a bar that
120 the bank had violated the act of Congress in lending a larger amount of its capital stock than had been actually paid in. There the court says, "we do not think that public policy requires or that the act of Congress intended that an excess of loans beyond the proportion specified should enable the borrower to avoid the payment of the money actually received by him."

In Cowell *v.* Springs Company, 100 U. S., 55, upon a breach of a condition in a deed that intoxicating liquors should not be manufactured or sold upon the premises, the grantee was not allowed to set up the invalidity of the title in defense of a suit

to enforce the terms of the condition. In Williams 121
v. Gideon, 7 Heisk. (Tenn.), 621, the principle is well settled that the creditor who has confirmed a fraudulent deed by receiving a benefit under it, or becoming a party to it is estopped from impeaching it. And there are many other cases holding that corporations acting *ultra vires* and making invalid contracts may nevertheless enforce them against persons who have received the benefit, upon the doctrine that they are estopped to deny the binding effect of that which they have done voluntarily and with full knowledge of the facts. Ohio R. R. Co. *v.* McCarthy, 96 U. S., 258; National Bank *v.* Matthews, 98 U. S., 621, where the court quotes with approval Mr. Sedgwick's statement that, "where it is a 122
simple question of authority to contract arising either on a question of regularity of organization or of power conferred by the charter, the party who has had the benefit of an agreement cannot be permitted in an action founded upon it to question its validity. It would be in the highest degree inequitable and unjust to permit a defendant to repudiate a contract the benefit of which he retains." Sedg. Stat. & Con. Law, 73; Whitney Arms Co. *v.* Barlow, 63 N. Y., 62; Sherwood *v.* Alvis, 83 Ala. 115; Ray *v.* Home, etc., Co., 98 Ga., 132; Macon R'y Co. *v.* Georgia R. R. Co., 63 Ga., 103; Poock *v.* La Fayette B. & L. Ass'n, 71 Ind., 657; Pancost *v.* Travelers' Insurance Co., 79 Ind , 172; Steam Nav. 123
Co. *v.* Weed, 17 Barbour, 378.

It must be conceded that this doctrine does not apply to contracts involving moral turpitude on the part of both contracting parties or those which have some infirmity that arises out of a violation of public policy and public law constituted and maintained for the safeguard of the public against dangers threatening the health, morals and safety of the people, but this power of regulating foreign corporations and the methods of doing their business within the State or prohibiting them from doing business within the State at all has no such foundation

124 as that. The laws are purely administrative and more directory than mandatory in their character.

At all events, if there are any cases involving the State's power over foreign corporations to which the doctrine of estoppel does apply, this case must fall within that class.

What has been said about the acts of 1891 applicable to all foreign corporations is equally applicable to the special act relating to building and loan associations of March 28th, 1891, ch. 2, p. 17, Acts 1891. That act is purely directory in its provisions. It does not impose any penalties for its violation nor does it contain anything prohibiting the doing of business within the State with-
125 out a compliance with its directions. Much less than the other acts can it be said to declare the contracts made by foreign building and loan associations without compliance with it void or to forbid their enforcement in the State courts. Its 7th section prohibits the officers, directors or agents from soliciting subscriptions of stock in this State or selling or knowingly cause to be sold or issued to a resident of this State any stock of the association without having deposited the securities required with the State treasurer; and it also requires the agents to have a license for which, as always, a fee is charged, and it punishes violation of this provision by making it a misdemeanor. Some penal-
126 ties are imposed upon domestic corporations for a violation of the directions requiring them to keep deposits with the treasurer, but there is not one line, word or syllable of the whole act which makes the contracts void. However, since the act of March 17th, 1891, ch. 95, and the act of March 26th, 1891, ch. 122, in their terms apply to building & loan as well as to all other corporations, the whole legislation may be taken as standing together, *pari passu*, upon the same footing one with another, and, taken altogether, it may be said that contracts falling within the prohibitions are not enforceable by the State courts of Tennessee, and perhaps not by the Fed-

eral courts sitting within the State, though, as be- 127
fore remarked, that may be doubtful. Yet, the fact remains, that a contract by any of these corporations to be performed in another State does not fall within the denunciations and prohibitions of the statute. These acts comprehend every foreign corporation whatever, and if they are to be construed and enforced in the manner suggested by this defense, they would make void and non enforceable every ordinary loan of money by a banking corporation in another State to a citizen of Tennessee carried on by a correspondence through the mails or through the agency of local banks and loan brokers, as well as every other commercial contract which can possibly be conceived, made with foreign corpo- 128
rations. It is inconceivable that the legislature had any intention to give the statute such effect as that, and the true spirit and meaning of the act is in my judgment found in the fourth section of the act of March 26, 1891, ch. 122, and also of the original act of 1877, M. & V. Code, sec. 1994, as follows:

"SEC. 4. That when any corporation complies with the provisions of this act it shall then be to all intents and purposes a domestic corporation, and may sue and be sued in the courts of this State, and subject to the jurisdiction of the courts of this State just as if it were created under the laws of this State." This means that foreign corporations may have the privilege of becoming Tennessee corpora- 129
tions by compliance with these statutes, and their domestication was the real purpose of all the acts. Foreign corporations that desire such domestication must comply with the provisions of these statutes, and if they carry on their business in the same manner that domestic corporations do and make their contracts to be performed within the State of Tennessee without compliance with these acts, then they are within the pains and penalties of the statutes. But if they confine their business to their own home places, make their contracts there, to be performed there, as was done in this case, they

130 are not within the pains and penalties of the acts, and such contracts are not affected by them. As to such contracts it is not within the power of the State to discharge or suspend their obligations. It may be within the power of the State by judicial construction of the act to close the courts of Tennessee to their enforcement, but they cannot close the courts of the United States to suitors who resort to those tribunals for enforcement of the contract. Says Mr. Justice Clifford, in Greene *v.* Commercial, etc., Bank, 3 Cliff., 494 (Fed. cas. No. 5755):

"Doubts may at one time have existed upon the subject, but it is now well settled that a State law cannot discharge or suspend the obligation of a con-
131 tract made in another State if it was legal where it was made and was a contract with a citizen of another State, not even if it was to be performed in the State whose law is invoked to defeat the remedy."

He cites Baldwin *v.* Bank of Newbury, 1 Wall., 236; Suydam *v.* Broadnax, 14 Pet., 74; Union Bank *v.* Jolly, 18 How., 503; Watson *v.* Tarpley, *id.*, 520; Hight *v.* Stone, 20 How., 175; Demerit *v.* Exchange Bank, 1 Brunner Cas., 598; Fed. Cas. No. 3780; Hunt *v.* Danforth, 2 Curtis, 592; Fed. Cas. No. 6887, in which Mr. Justice Curtis remarks—"No State law can *proprio vigore*, deprive this court of jurisdiction conferred by the Constitution and laws of
132 the United States," applying the doctrine to the effect of the insolvency laws of a State. See also Cowles *v.* Mercer Co., 7 Wall., 118; So. Pac. R'y Co. *v.* Denton, 146 U. S., 202.

It is sufficient to refer to the case of Cæsar *v.* Cappell, 83 F. R., 403, as to the judgment of the court upon the effect of the filing of the charter with the secretary of state and the abstract thereof on Aug. 11, 1893, subsequently to the making of the contract and prior to the passage of the curative act of May 10, 1895. We there held that a compliance with the statute prior to act of 1895 was, in itself, a sufficient filing which removed whatever infirmity

there was in the contract, and therefore it might 133
be enforced by the courts without regard to the act of 1895 subsequently passed. It was there said:

"The infirmity which existed before that time was that the courts of Tennessee, State and Federal, if you please, would not enforce a contract made in disobedience of the statute, but whenever that disobedience was removed and the parties complied with the conditions there was no longer any substantial reason why the courts should not enforce it.

Any reason that might be assigned for not enforcing it would be neither within the mischiefs to be remedied by the statute nor within the enforcement of any policy declared by it. but purely and entirely sentimental; the sentiment being that the 134
contract having been originally made in disrespect of the statute, should be forever disfavored by the courts and repelled from their precincts, until the legislature had granted a statutory pardon. We think it will be found that courts do not proceed upon any such theory unless the infirmity inheres in the vicious, immoral or criminal nature of the act itself."

This still seems to me quite a substantial answer to the defense that has been set up in this suit.

The result is that the plaintiff is entitled to a decree for the collection of its debt and the foreclosure of its mortgage, and the usual decree for that purpose will be drawn and entered. 135

Decree accordingly. (88 Fed. Rep., pp. 7-21; Transcript, pp. 100-116.)

Status and Relationship of Appellants and Appellee.

Having thus traced the judicial history of this case and incidentally shown the facts as found to exist by the Circuit Judge, who heard the case in the first instance, and by the Judges of the Circuit

136 Court of Appeals who certified the case to this court, we now invite the attention of the Court to certain specific facts appearing in the record, which show the status of the appellants and appellee and the relationship that appellant H. L. Bedford bears to the appellee as a stockholder therein, occupying, under the settled doctrines of law applicable to corporations of this particular class, a relation practically in the nature of a partnership with the other stockholders in the Eastern Building and Loan Association. Said association is a strictly mutual corporation organized and existing under the laws of the State of New York, and it dealt with the appellant H. L. Bedford in all matters shown by
137 the record in this case, purely in his capacity as a stockholder whose rights and obligations became and are fixed and determined by the Articles of Incorporation of the Eastern Building and Loan Association, its corporate by-laws, rules and regulations and the laws and judicial decisions of the State of New York. The specific facts to which we direct attention are as follows:

1. The Eastern Building and Loan Association of Syracuse, N. Y., is a corporation organized and existing under the laws of the State of New York, having its corporate situs and principal place of business in the City of Syracuse in said State, and it
138 was as a corporation and citizen of the State of New York that appellee filed its bill in this suit in the United States Circuit Court in Tennessee against the appellants, citizens of and residents in Tennessee (Transcript, p. 1, fol. 2; p. 12, fol. 15).

2. The Articles of Incorporation of the Eastern Building and Loan Association show that it is a corporation organized as a building and loan association under Chapter 122 of the Laws of 1851 of New York, entitled "An Act for the Incorporation of Building, Mutual Loan and Accumulating Fund Associations," and that its powers, duties and cor-

porate status are fixed by said Act of 1851 "and the 139
acts amendatory thereof and supplementary thereto"
(Transcript, p. 44, fol. 55).

3. Chapter 122 of the New York Laws of 1851, under which the appellee was organized, is as follows:

CHAP. 122.

AN ACT for the incorporation of building, mutual loan and accumulating fund associations.

PASSED April 10, 1851.

The People of the State of New York, represented 140
in Senate and Assembly, do enact as follows:

§ 1. Any number of persons, not less than nine, may associate and form an incorporated company for the purpose of accumulating a fund for the purchase of real estate, the erection of buildings, or the making of other improvements on lands, or to pay off incumbrances thereon, or to aid its members in acquiring real estate, making improvements thereon, and removing encumbrances therefrom; and for the further purpose of accumulating a fund to be returned to its members, who do not obtain advances as above mentioned, when the funds of such association shall amount to a certain sum per share, to be specified in the articles of association. 141

§ 2. Such persons shall severally subscribe articles of association, in which shall be set forth the name of the corporation, the time of its regular meetings, and how special meetings may be called, and what shall constitute a quorum to transact business at meetings; the qualification of members and how constituted; what officers, trustees and attorney there shall be, and how and when chosen, and their duties; and how removed or suspended from office; the entrance fee of new members and new shares, the monthly or weekly dues per share, the redemption fee on shares on which advances shall be made,

and fees to be paid on the transfer of shares; the fines and penalties for non-payment of dues or fees, or other violation of the articles of association; the manner of redemption of shares by advances made thereon, the mortgaged security to be taken on such advances, and how the same may be redeemed or changed; the manner of the transfer or withdrawal of shares; the manner of investing funds not required for advances on shares; the qualifications of voters at the meetings, and the mode of voting; the ultimate amount to be paid to the owners of unredeemed shares; the manner of altering or amending the articles of association, and such other provisions as shall be necessary for the convenient and effective transaction of the business thereof; provided, that the same shall not in any respect contravene the constitution or laws of this state.

§ 3. A true copy of such articles, signed by the officers of the association, together with a statement showing when the association was organized, and the place of the transaction of its business, and the names of the officers and trustees at the time of the making of such statement, which shall be verified by oath or affirmation before any officer authorized to take affidavits, to be used in courts of justice, shall be filed in the office of the clerk of the county in which such association shall transact its business; and thereupon the persons who have subscribed the articles of association as aforesaid, and such other persons as shall become members of such association, and their successors, shall be a body corporate by the name specified in such articles of association, and shall possess the powers and privileges, and be subject to the provisions of title third of chapter eighteen of the first part of the Revised Statutes, so far as those provisions are consistent with the provisions of this act, and they shall by their corporate name, be capable in law of purchasing, holding and conveying any real and personal estate whatever, which may be necessary to enable said company to carry on their operation named in such certificate.

§ 4. It shall be lawful for the trustees to call in 145
and demand from the stockholders, respectively, all such sums of money by them subscribed, at such times and in such payments or installments as the articles of association shall prescribe, under the penalty of forfeiting the shares of stock subscribed for, and all previous payments made thereon, if payment shall not be made by the stockholder within sixty days after a personal demand or notice requiring such payment shall have been published for six successive weeks in the newspaper nearest the place where the business of the company shall be carried on as aforesaid.

§ 5. All corporations formed under this act shall have power to borrow money for temporary pur- 146
poses not inconsistent with the objects of their organization; but no loan for such purposes shall have a longer duration than two years, nor shall such indebtedness exceed at any one time one-fourth of the aggregate amount of the shares and parts of shares, and the income thereof, actually paid in and received.

§ 6. Parents and guardians may take and hold shares in such association in behalf and for the use of their minor children or wards, provided the cost of such shares be defrayed from the personal earnings of such minor children or wards, or by gifts from persons other than their male parents; married women may take and hold shares in such associa- 147
tions, provided the cost of such shares be defrayed from their personal earnings, the personal earnings of their children voluntarily bestowed for this purpose, or from property bequeathed or given to them by persons other than their husbands.

§ 7. Every such corporation shall terminate, except for the purpose of settling its affairs, whenever all the shares thereof shall be redeemed by advances thereon, or whenever the owners of unredeemed shares shall be paid the ultimate value thereof, as provided in the articles of association, and not sooner; but no dividend of principal or of profits

shall be made until such termination, nor until all the debts of the association shall have been paid or otherwise sufficiently provided for. No holder of redeemed shares shall claim to be exempt from making the monthly payments provided in the articles of association, upon the ground that by reason of losses or otherwise the association has continued longer than was originally anticipated, whereby the payments made on such shares may amount to more than the amount originally advanced, with legal interest thereon; nor shall the imposition of fines for non-payment of dues or fees, or other violation of the articles of association, nor shall the making of any monthly payment required by the articles of association, or of any premiums for loans made to members be deemed a violation of the provisions of any statute against usury.

§ 8. Any existing association formed for the purposes mentioned in the first section of this act, may, on the vote of a majority of the voting shares, at any regular meeting after the passage of this act, become entitled to the benefit of this act, on complying with the second and third sections thereof, unless the second section has heretofore been complied with; in which case it shall be necessary to comply only with the said third section.

§ 9. No officer, trustee, attorney, agent or servant of any association hereby incorporated, shall use or dispose of any part of the funds of such association, or assign, transfer, cancel or deliver up or acknowledge satisfaction of any bond, mortgage or other written instrument belonging to such association, unless duly authorized, or be guilty of any fraud in the performance of his duties; and every person guilty of a violation of this section shall be liable civilly to the party injured, to the extent of the damage thereby incurred, and shall also be liable to an indictment for a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court by which he shall be tried.

§ 10. Each association formed under the provi- 151
sions of this act, shall, at the close of its first year's operations, and annually at the same period in each year thereafter, publish in at least two newspapers published in the place where their business may be located, or if no newspaper shall be published in such place, then in any two newspapers published nearest such place, a concise statement verified on the oaths of its president and secretary, showing the actual financial condition of the association, and the amount of its property and liabilities, specifying the same particularly.

§ 11. All the shareholders of any association formed under this act, shall be individually liable to the creditors of said association, to an amount 152
equal to the amount of stock held by them respectively, for all debts contracted by such association. The directors or other officers of every association formed under this act, shall be personally liable for any fraudulent use, disposition or investment of any moneys or property belonging to such association, or for any loss which shall be incurred by any investment made by such directors or other officers, other than such as are mentioned in and authorized by this act; but no director or other officer of any such association, shall be liable as aforesaid, except he authorized, sanctioned, approved or made such fraudulent use, disposition or investment as aforesaid. 153

§ 12. No person holding stock in any such company, as executor, administrator, guardian or trustee, and no person holding such stock as collateral security, shall be personally subject to any liability as stockholder of such company, but the person pledging such stock shall be considered as holding the same, and shall be liable as a stockholder accordingly; and the estate and funds in the hands of such executor, administrator, guardian or trustee shall be liable in like manner, and to the same extent as the testator or intestate, or the ward or person inter-

154 ested in such trust fund would have been if he had been living and competent to act, and hold the same stock in his own name.

§ 13. Every such executor, administrator, guardian or trustee, shall represent the share of stock in his hands at all meetings of the company, and may vote accordingly as a stockholder; and every person who shall pledge his stock as aforesaid, may, nevertheless, represent the same at all such meetings, and may vote accordingly as a stockholder.

§ 14. In case it shall happen at any time, that an election of officers shall not be made on the day designated by the by-laws of said company, when it ought to have been made, the company for that
155 reason shall not be dissolved; but it shall be lawful, on any other day, to hold an election for trustees, in such manner as shall be provided for by the said by-laws; and all acts of trustees shall be valid and binding as against such company, until their successors shall be elected.

§ 15. The legislature may at any time alter, amend, or repeal this act, or may annul or repeal any incorporation formed or created under this act; but such amendment or repeal shall not, nor shall the dissolution of any such company take away or impair any remedy given against any such corporation, its stockholders or officers, for any liability which shall have been previously incurred.

156 § 16. Any company which may be formed under this act, may increase or diminish its capital stock, by complying with the provisions of this act, to any amount which may be deemed sufficient and proper for the purposes of the corporation. But before any corporation shall be entitled to diminish the amount of its capital stock, if the amount of its debts and liabilities shall exceed the amount of capital to which it is proposed to be reduced, such amount of debts and liabilities shall be satisfied and reduced so as not to exceed such diminished amount of capital.

§ 17. Whenever any company shall desire to call 157
a meeting of the stockholders, for the purpose of increasing or diminishing the amount of its capital stock, it shall be the duty of the trustees to publish a notice signed by at least a majority of them, in a newspaper in the county, if any shall be published therein, at least three successive weeks, and to deposit a written or printed copy thereof in the post-office, addressed to each stockholder at his usual place of residence, at least three weeks previous to the day fixed upon for holding such meeting, specifying the object of the meeting, the time and place when and where such meeting shall be held, and the amount to which it shall be proposed to increase or diminish the capital, and a vote of at least two- 158
thirds of all the shares of stock shall be necessary to an increase or diminution of the amount of its capital stock.

§ 18. If at any time and place specified in the notice provided for in the preceding section of this act, stockholders shall appear in person or by proxy, in numbers representing not less than two-thirds of all the shares of stock of the corporation, they shall organize, by choosing one of the trustees chairman of the meeting, and also a suitable person for secretary, and proceed to a vote of those present, in person or by proxy; and if on canvassing the votes it shall appear that a sufficient number of votes has been given in favor of increasing or diminishing the 159
amount of capital, a certificate of the proceeding, showing a compliance with the provisions of this act, the amount of capital actually paid in, the whole amount of debts and liabilities of the company, and the amount to which the capital stock shall be increased or diminished, shall be made out, signed and verified by the affidavit of the chairman, and be countersigned by the secretary; and such certificate shall be acknowledged by the chairman, and filed as required by the first section of this act; and when so filed, the capital stock of such corporation shall be

160 increased or diminished to the amount specified in such certificate.

§ 19. The shares held by the members of all associations incorporated under the provisions of this act, shall be exempt from sale on execution for debt, to an extent not exceeding six hundred dollars in such shares, at their par value.

§ 20. No loan made by any such association to any of its members may exceed in amount the par value of the capital stock for which such member may have subscribed.

§ 21. The copy of any certificate of incorporation, filed in pursuance of this act, certified by the county clerk or his deputy, to be a true copy, and of the
161 whole of such certificate, shall be received in all courts and places, as presumptive legal evidence of the facts therein stated.

4. The above quoted Act of 1851 is still in full force and effect in the State of New York so far as appellee and its members are concerned, except that some minor amendments of no importance, so far as this case is concerned, were made to the Act of 1851 by Chapter 564 of the Laws of New York of 1875 (Laws of New York 1875, Ch., 564).

5. The Articles of Incorporation of the appellee provide, among other things, the following;

162 "II.—This association is formed for the purpose of purchasing real estate; for the erection of buildings or other improvements, and the improvement of lands; for aiding members in acquiring or improving real estate, or of removing encumbrances thereon by means of advances; for accumulating a fund for the benefit of members who do not obtain advances; and for the purpose of conducting the general business of a building and loan association, and providing the advantages usually expected from savings banks and other institutions of like character.

"III.—The principal place of business of this association shall be located at Syracuse, N. Y., but branches or agencies may be established and business done in any part of the State of New York or in any State or Territory of the United States as the board of directors may direct." 163

"V.—The qualification of members shall be as follows: Any person upwards of twenty-one years of age, or parents or guardians of children, may become members of this association, and shall become such upon subscribing for two or more shares of stock in this association as prescribed by the by-laws thereof.

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"VI.—The management of all the business of the association shall be vested in a board of nine directors, who shall be chosen at each regular meeting. Said board shall have full power and authority to fill all vacancies and make such by-laws, rules and regulations for the general management and conduct of the business of this association as they may deem necessary."

"IX.—The entrance fee of new members and new shares shall be one dollar ($1.00) per share of stock in said association. The monthly dues per share shall be seventy-five cents ($0.75). There shall be a transfer fee of two dollars ($2.00) on each and every certificate of shares transferred. The fines for non-payment of dues shall be ten cents ($0.10) on each and every share of stock unpledged and twenty cents ($0.20) on all stock pledged for each and every month the payment may be in arrears. In case a monthly payment on any share shall become past due and payable for a period of six months or more such share shall be sold for the purpose of paying the arrearages. The proceeds of the sale shall first be used to pay all back monthly payments and fines and the balance remaining after paying all accrued 165

166 fines and monthly payments shall be paid to the member in whose name the stock stands at the time of sale. If the stock brings no more than enough to pay the accrued fines and monthly payments, it shall be bid in by the association and canceled, and the amounts standing to the credit thereof in the loan fund shall be divided among the other shares as profits.

"X.—The advances or loans made to any member of this association shall not exceed the face value of the stock owned by him, and except as hereinafter stated shall be upon satisfactory first mortgages, real-estate security, and be under such rules and
167 regulations as the by-laws and the board of directors may require. Loans may be made upon shares in good standing, and in force one year to an amount not exceeding 90 per cent. of the monthly dues paid to the association upon such shares as collateral security, and upon such notes, bond or other obligation or instrument as the board of directors and by-laws may require A uniform premium of 10 per cent. shall be paid and allowed by the borrower upon each loan; and upon all loans the borrower shall pay interest at the rate of 5 per cent. per annum and a premium of 5 per cent. per annum as a redemption fee and the same shall be paid on the last Saturday of each month during the continuance of said
168 loan at the principal office of the association. In case the monthly installments or loans are not paid as aforesaid, then interest at the rate of 6 per cent. per annum payable semi-annually shall be collected thereon; and in case default shall be made in the payment of the regular monthly installments, fees or dues, the association may compel payment of principal, interest and premiums, assessments, fees or dues by proceeding upon the note, or other obligation and mortgage, which shall at once become fully due and payable, and the association may cancel and treat as forfeited the shareholder's shares of

stock, whether deposited as collateral security or 169
not, and all payments previously made thereon, shall be forfeited to the association. Pledged shares may be transferred upon consent of the association by transferring the mortgage security upon payment of the fee therefor, provided all assessments, installments, dues and charges thereon are paid to date, and subject to such other regulations, if any, as the by-laws may provide. Any shareholder may have his mortgage transferred or changed from one piece of property to another by giving thirty days' notice in writing, the shareholder to pay all expenses incurred by the transfer of the same. Loans may be prepaid and the mortgaged property released upon application to the association, and giv- 170
ing thirty days' notice in writing of the intention. An equitable discount shall be allowed therefor to be determined by the board of directors (Transcript, p. 45, and pp. 46, 47).

(It will be noted that appellee was incorporated in February, 1890 (Transcript, pp. 49, 50).)

6. The Eastern Building and Loan Association, pursuant to the law under which it was organized, at the time of its organization formally adopted a set of by-laws (Transcript, p. 50, fol. 62) and these by-laws were duly given in evidence and appear in the record in this case (Transcript, pp. 55–63).

In this connection it will be noticed that these 171
by-laws were set out in full upon the back of the certificate of stock issued to the appellant H. L. Bedford, which certificate constituted him a member of the Eastern Building and Loan Association.

(Deposition of D. A. Pierce, Transcript, p. 27, Int. 6; and Exhibit C thereto, Transcript, pp. 53–63).

7. Appellant H. L. Bedford made application and subscribed for stock in the Eastern Building and Loan Association on the 2d day of January, 1891,

172 and in his application recited: "I hereby agree to abide by all the terms conditions and by-laws contained or referred to in the certificate of shares, and will also comply with all the rules and regulations of said association."

(Evidence of D. A. Pierce, Transcript, p. 26, Int. 4; Exhibit B, Transcript, p. 51, fol. 64.)

It appears that this application for stock was received by the appellee at its Home Office in New York before January 26th, 1891, and that a stock certificate for forty six (46) shares, numbered 4773, was shortly thereafter issued to appellant H. L. Bed-
173 ford (Transcript, p. 51, fol. 64, and p. 53).

Appellants were, at the time of said application for membership in appellee and the issue of stock certificate to appellant H. L. Bedford, as aforesaid, citizens, residents and inhabitants of the State of Tennessee (Transcript, p. 12, fol. 15; p. 51, fol. 65; p. 53, fol. 66).

8. Appellant H. L. Bedford, after his application for membership in appellee on January 2nd, 1891, and after the receipt of his certificate of stock issued to him under date of February 2, 1891 (Transcript, pp. 51, 55), made regular monthly payments of dues or calls upon said stock, in accordance with the Ar-
174 ticles of Incorporation and by-laws of the appellee for about three months thereafter, and then, on or about *March 20, 1891*, he made and signed a formal application for an advance or loan to him as a stockholder in appellee of the par or maturity value of his shares (Transcript, p. 63, fol. 79; p. 66, fol. 82.)

9. Appellee H. L. Bedford, in making his application for stock transmitted such application to appellee at its Home Office in Syracuse, N. Y., through J. H. T. Martin and H. B. Martin, local solicitors for the Association, having the right to receive ap-

plications for membership in appellee, the same to 175
be forwarded to the Home Office of the Association in Syracuse for acceptance.

(Deposition of D. A. Pierce, Transcript, p. 32, int. 20, and ans. thereto.)

These soliciting agents were working purely upon a commission basis and had no authority to bind the Association in any way, and no authority to make loans or advances to members or enter into any agreements in relation thereto.

(Deposition of D. A. Pierce, Transcript, p. 32, int. 20 and ans. thereto.)

Their powers were limited to taking applications 176
for stock or for advances to members and forwarding them to the Home Office of the corporation at Syracuse, N. Y., for acceptance or rejection there by the proper officers and directors of the corporation.

(Deposition of D. A. Pierce, Transcript, p. 32, int. 20 and ans. thereto.)

(By-Laws, Art. 15, §§ 1, 2; Transcript, p. 62.)

10. The stock certificate of the appellant H. L. Bedford, although bearing date February 2, 1891, was in fact issued to him on January 26, 1891, the reason for its being dated ahead being to make it a 177
part of a certain series of stock, and the explanation of this matter appears in the transcript.

(Deposition of D. A. Pierce, Transcript, pp. 26, 27, int. 6 and ans. thereto.)

11. The application for an advance or loan upon the Bedford stock was made, as has been already stated, on March 20, 1891, but, under the rules and regulations of the appellee, an appraisement of the property offered as security was required to accompany the application. This appraisement in the Bed-

178 ford matter does not appear to have taken place until the 5th day of May, 1891.

(Transcript, pp. 66, 67, fol. 83; pp. 39, 40, fol. 49; Deposition of D. A. Pierce, cross-int. 14 and ans.)

12. The application for an advance by appellant Bedford after the appraisal had been made, was forwarded to the Home Office of the appellee at Syracuse, N. Y., for action and acceptance or rejection by it. It was forwarded through the soliciting agents of the Association at Memphis, Tennessee, but they did not then, nor did they at any time undertake to contract with the appellant in reference
179 to the loan or advance, their duties being limited to the taking of the application and the forwarding of the same to Syracuse for action.

(Transcript, pp. 32, 33, fols. 40, 41; Deposition of D. A. Pierce, int. 20 and ans. thereto.)

(Transcript, pp. 35, 36, fol. 44; Deposition D. A. Pierce, cross-int. 4, 5.)

(Transcript, pp. 39, 40; Deposition D. A. Pierce, cross-int. 14 and ans. thereto.)

13. The application of appellant H. L. Bedford for an advance or loan was submitted to the Board of
180 Directors of the appellee at Syracuse, N. Y., on May 18, 1891, and the application approved and the advance or loan granted, as appears from the minutes of a directors' meeting.

(Transcript, pp. 41, 42; Deposition of D. A. Pierce, cross-int. 16 and ans. thereto.)

(Transcript, p. 70, fol. 88; Exhibit H to Deposition of D. A. Pierce.)

14. After being advised that his application for a loan or advance had been approved and the advance

granted by the appellee, appellant Bedford wrote a 181
letter to appellee, which he accompanied by an affidavit. In his letter he specifically requested that the advance be granted, and added, "I hereby agree to comply with the charter and by-laws of your Association and all requirements defined by your committee of the Board of Directors." The date of this letter is not shown, but the affidavit accompanying it was subscribed and sworn to June 20, 1891.

(Transcript, pp. 27, 28; Deposition of D. A. Pierce, int. 9 and ans. thereto; also Transcript, pp. 67, 68, fol. 84.)

15. The loan or advance upon his application 182
having been granted to appellant Bedford by action of the Board of Directors of the appellee taken at Syracuse, N. Y., on May 18, 1891, his request in the letter and affidavit of June 20, that the money be advanced to him, was thereupon complied with by the appellee and the advance or loan was made to him. It appears, however, that the money was not actually sent to him until about the 8th day of July, 1891, the reason for the delay in the actual transmission of the money being, as appears from the deposition of Mr. Pierce, "that no moneys were ever paid on loans until the papers in the case were executed, the mortgage placed of record and the title shown to be all right and free and clear of all liens other than those, if any, which were to be 183
taken up and canceled from the proceeds of the loan."

(Transcript, p. 28; Deposition of D. A. Pierce, int. 10 and ans. thereto.

(Transcript, p. 29; Deposition of D. A. Pierce, int. 15 and ans. thereto.)

While, for the reason just stated, the money was not actually paid over to appellant H. L. Bedford until July, 1891, yet, it nevertheless appears "that as soon as the loan was granted the requested

184 moneys were set apart by the Association to meet the same."

(Transcript, pp. 29, 30; Deposition of D. A. Pierce, int. 15 and ans. thereto.)

16. It appears that the money upon this loan or advance was paid to appellant Bedford by a draft of the appellee upon the Trust and Deposit Company of Onondaga, New York, dated July 8, 1891, payable to the order of H. L. Bedford; that said draft was sent to him through H. B. Martin, one of the soliciting agents of the appellee at Memphis, Tennessee; that he accepted the draft, endorsed and collected it.

185 (Transcript, pp. 29, 30; Deposition of D. A. Pierce, int. 15 and ans. thereto.)

17. While the money upon the loan or advance to him was not paid over, through the delivery of the draft aforesaid, until early in July, 1891, yet it appears that the mortgage given by the appellants to secure the loan or advance made to them was dated May 1, 1891, was acknowledged the 18th day of June, 1891, and was filed for registration in the Register's office of Shelby County, Tennessee, on June 20, 1891 (Transcript, pp. 22, 24, 25, fols. 30, 31), the entire transaction being treated in the mortgage and the notes secured by the same as having been consummated in May, 1891, the first note executed
186 by Bedford falling due on the last Saturday of May, 1891, and a similar note each succeeding month thereafter during the time the loan was estimated to run.

(Transcript, p. 36; Deposition of D. A. Pierce, cross-int. 7 and ans. thereto.)

18. The appellant H. L. Bedford assigned his stock certificate to the appellee by way of collateral and in accordance with the usual custom of the appellee.

(Transcript, p. 30; Deposition of D. A. Pierce; same deposition, Transcript, p. 33, fol. 42, ans. to int. 20.)

19. All of the papers, including the mortgage and notes, were prepared by the general attorney of the appellee, at the home office of the company in Syracuse, N. Y., and forwarded to the local attorney representing the appellee at Memphis, Tennessee, for execution. 187

(Transcript, pp. 28, 29; Deposition of D. A. Pierce, int. 11 and ans. thereto.)

20. The notes of the appellant H. L. Bedford to the appellee were all made payable to the order of the appellee at its home office in Syracuse, N. Y. The understanding at the time the notes were executed and accepted was that they were to be paid at the place designated as the place of payment. There never was any agreement or understanding to the contrary, although it appears that the practice for a time in the actual payment of the notes was for the appellant Bedford to make payment of the amount due thereon by check or otherwise through the soliciting agent of the appellee at Memphis, who would transmit the money or check given him with which to pay the note, and subsequently turn over the note, when received from the appellee, to the appellant. 188

(Transcript, pp. 71–77.)

(Transcript, p. 33, Deposition of D. A. Pierce.)

(Transcript, p. 37, Deposition of D. A. Pierce, cross-int. 7 and ans. thereto.) 189

(Transcript, pp. 40, 41; Deposition D. A. Pierce, cross-int. 15 and ans. thereto.)

While the payments of some of the notes were made by appellant H. L. Bedford through Martin, one of the soliciting agents of the appellee at Memphis, yet it appears that in this matter Martin was acting rather as the agent of the appellant Bedford than as the agent of the appellee, because he was, at the time the loan in question was made to Bedford

190 and at the time the certificate of shares was issued to him and for some time thereafter, the local secretary and treasurer of the Memphis Local Board of the appellee. That Local Board was expressly understood to represent and act for the members of appellee at Memphis, and was in fact a local organization for their own benefit and the protection of the interests of such members, and the treasurer of the Local Board was, by express understanding and agreement, the agent for the members at Memphis who made payments to him, and he did not act as agent for the Association in receiving such payments.

(Transcript, p. 33, Deposition of D. A. Pierce, int. 20 and ans. thereto.)

191 (Transcript, pp. 69, 70, Exhibit G to Deposition of D. A. Pierce.)

21. It was to J. H. T. Martin, as treasurer of the Local Board, that for a time payments of notes or of the moneys with which to pay the notes, was made by the appellant Bedford. For a few months after the loan to Bedford was consummated, appellee sent the notes to Martin in advance of their actual payment, but "after December, 1891, however, no notes were ever forwarded until the moneys thereon had actually been received" at the home office of the association in Syracuse, and later payments were made
192 through the Memphis banks direct to the appellee at Syracuse.

(Transcript, p. 33, fol. 41, Deposition of D. A. Pierce, int. 20 and ans. thereto.)

The specific facts regarding the payment of the first twenty-five notes, which were all that were ever paid by the appellants, are shown in the deposition of D. A. Pierce.

(Transcript, pp. 36, 37, Deposition of D. A. Pierce, cross-int. 7 and ans. thereto.)

22. The appellant Bedford made payments of dues upon his stocks for a period of 28 months down to and including May, 1893, and also made payments of all the notes executed by him maturing up to that date. On that date and thenceforward he defaulted in the payments due from him to the Association, and the true status of his account is shown in the transcript by the deposition of W. H. Emery. 193

(Transcript, pp. 78-80, Deposition of W. H. Emery.)

23. It appears that the appellant Bedford is an educated man, trained first as a civil engineer and afterwards as a lawyer. 194

(Transcript, pp. 93, 94, Deposition of H. L. Bedford, cross-examination.)

24. It was stipulated by the parties that the appellee filed a copy of its charter with the Secretary of State of Tennessee, on the 11th day of August, 1893, and filed an abstract of same in the office of the Register of Shelby County, Tennessee, on August 15, 1893, but that nothing else was done by it towards complying with the Act of March 26, 1891, or any of the acts; and it was further stipulated that at the times referred to, J. W. Buchanan, an attorney practicing at the Memphis bar, was the local attorney and legal adviser of the appellee, and that when the Tennessee Act of March 26, 1891, was passed, he advised appellee not to sell any more stock in the State until compliance with that act, but he further advised that it had a right to make loans on stock already sold in accordance with the rights given to every shareholder under his certificate. 195

(Transcript, pp. 91, 92, Stipulation.)

25. It was also stipulated that during the period covered by the transactions between the appellee and the appellants, the appellee made some loans to stockholders in Tennessee outside of Shelby County,

196 and that the methods pursued in regard to these loans were similar to those followed in the transaction with appellants.

(Transcript, p. 92, Stipulation.)

26. It appears that after appellant H. L. Bedford had subscribed for stock in appellee, and the stock had actually been issued to him, and after he had made his application to appellee for a loan or advance upon said stock, the Legislature of Tennessee, on March 26, 1891, passed the two acts set forth in the certificate herein from the Circuit Court of Appeals and appearing in the record in this case in full.

(Transcript, pp. 130–132; *ante*, pp. 15–19,
197 fols. 44–55.)

27. Appellants having failed to meet their obligations to appellee under the terms of the subscription for stock by the appellant H. L. Bedford, and the application for a loan or advance and the notes executed by H. L. Bedford and the mortgage executed by the appellants, appellee, on June 24, 1895, filed its original bill in this cause as the complainant in the Circuit Court, seeking to foreclose said mortgage and to collect the balance of indebtedness due from the appellants to the appellee under the terms and conditions of the mortgage aforesaid and the articles of incorporation and by-laws of the appellee. Ap-
198 pellants answered said bill, and in their answer set up, among other things, the following grounds of defence:

FIRST.—That the appellee, being a foreign corporation, was, in the transactions above set forth, doing business in Tennessee in violation of the statutes above referred to and without compliance therewith, and, therefore, that the mortgage aforesaid and the transactions between the appellee and the appellant Bedford were illegal and void and the notes, mortgages and contracts unenforceable in the State of Tennessee.

SECOND.—The appellants denied that appellee was 199
a building and loan association and contended that because it was not a building and loan association, within the contemplation of the laws of Tennessee, and had not made its loan or advance in accordance with the Tennessee laws regulating such associations, and had not complied with the statutes aforesaid, therefore the contract for the loan or advance was usurious.

It was not denied that the appellants had executed the mortgage to the appellee, nor was it denied that the notes, application for stock, application for loan, &c., had all been executed by appellant H. L. Bedford, as alleged in the bill of complaint and as shown in the foregoing record, the 200
contentions of the appellants as to their non-liability being entirely technical and resting substantially upon the propositions already stated.

Upon this state of the record, on the hearing in the Circuit Court, a decree was rendered in favor of the complainant for $5,075.37, with interest from the date of the decree and with the costs of suit. The same was declared to be a lien upon the land and premises conveyed by the mortgage described in the bill, and a foreclosure of the mortgage was decreed.

It was from this decree that the appellants took an appeal to the Circuit Court of Appeals for the Sixth Circuit, and upon the hearing in that court 201
the case was certified to this court as above set forth.

(Transcript, pp. 98-100, Decree.)

SUMMARY OF FACTS.—It will be seen from the foregoing abstract of the facts shown by the record in this case, that the statement of facts certified to this Court by the Judges of the Circuit Court of Appeals for the Sixth Circuit is in all material respects full, accurate and complete, and amply serves to present to this court the true controversies between the parties, arising upon the face of the

202 record. If there be any defect or omission in the statement of facts certified up by the Judges of the Circuit Court of Appeals, it is in the failure to point out the exact status and relationship of the appellant H. L. Bedford to the appellee as a stockholder and member at the time he made application to appellee for a loan or advance and executed to it his several promissory notes above referred to and his mortgage to secure the same. We have in this statement of the case fully covered this point.

APPELLANT'S ASSIGNMENT OF ERRORS.

The questions which counsel for the appellants in the Circuit Court of Appeals regarded as presented
203 by the record are shown by their assignment of errors, which assignment was as follows, to wit:

Assignments of error by and on behalf of H. L. Bedford and L. M. Bedford, defendants and appellants.

The said above-named defendants and appellants, H. L. Bedford and L. M. Bedford, come and assign the following as errors in the rendition of the decree of June 4th, 1898:

1st. The court erred in rendering a decree against the defendants and each of them for any sum whatever.

2d. The court erred in rendering a decree against
204 the defendants and each of them for any sum for costs of this cause and for making the same a charge against the property or its proceeds.

3d. The court erred in not holding that the Eastern Building & Loan Association of Syracuse, N. Y., had not complied with the acts of the legislature of the State of Tennessee, viz.: Act of March 19th, 1877, chapter 31 of Acts of 1877, act of March 10, 1891, chapter 95 of Acts of 1891, act of March 21, 1891, chapter 122 of Acts of 1891, when the contract was made, and in not holding that such contract was void and unenforceable. The court should have held that such contract was void or unenforceable.

4th. The court erred in not holding that the East- 205
ern Building & Loan Association of Syracuse, New York, had never complied with the act of the legislature of the State of Tennessee of March 26, 1891, being chapter 2 of said Acts of 1891, and in not holding that the contract was void and unenforceable. The court should have held that such contract was void or unenforceable.

5th. The court erred in holding that the contract sued on was a New York contract and not a Tennessee contract. The court should have held that the contract was a Tennessee contract and not a New York contract.

6th. If the contract sued on be considered as a New York contract then the court erred in holding 206
it was valid and enforceable. The court should have held, even if it was a New York contract, that it was made by plaintiff in evasion of the Tennessee statutes set forth at Nos. 3 and 4 of this assignment of errors and was void or unenforceable in any court sitting in Tennessee, State or Federal.

7th. The court erred in holding that the statutes of the State of Tennessee referred to in Nos. 3 and 4 of this assignment of errors, if they applied to the contract in question, were in conflict with the Constitution of the United States or any part thereof. The court should have held that no such conflict existed and that the statutes referred to were valid and covered the transactions in question, and that 207
the contract was void or unenforceable.

8th. The Court erred in not holding that the act of the Legislature of the State of Tennessee of 1887, being chapter 226 of said Acts of 1887, defined what was doing business in the State of Tennessee by foreign corporations, and in not holding that plaintiff, in its transactions in question, was doing business in Tennessee in the sense of said statute without complying with the laws of Tennessee, and that its contract was void or unenforceable.

9th The Court erred in not holding that the plaintiff was and is a New York corporation, and that the law of the State of New York required corporations

208 of other States than New York having transactions with persons in that State to comply with the regulations of the New York statutes on such subjects, and where such compliance was not had, that contracts made were either void or unenforceable in New York. Such being the fact, the Court should have held similar requirements as to New York corporations existed in Tennessee, and that the contract was void or unenforceable.

10th. If the contract was not wholly void and was enforceable to any extent in Tennessee, then the Court was in error in not holding that the same was usurious. The Court should have held that the charging of a fixed premium for the loan made it
209 usurious to that extent, and should have further held that when Bedford was made to withdraw his shares in the plaintiff company that he lost all interest in any profits of the company and agreed to pay a fixed amount in a fixed time, and that thereby the said transaction became usurious and all usury should be eliminated and he be credited on the claim with the full amounts paid by him. The Court should have held that this was the law of the State of Tennessee as well as the law of the State of New York, and that if it were not the law of New York that it was the law of the State of Tennessee, applicable in this case, and that plaintiff, as a foreign corporation, had only the rights which a Tennessee
210 corporation would have.

11th. The Court erred in holding that defendants and appellants were estopped to plead the invalidity of the contracts sued on.

This assignment of errors, with some modifications, is repeated in the brief filed for appellants in this Court (Appellants' Brief, pp. 15-17).

To the questions presented by this assignment of errors and to those stated in the certificate of the Judges of the Circuit Court of Appeals for the Sixth Circuit, we address ourselves in the following *Brief and Argument:*

BRIEF.

I.

The appellee is a building and loan association organized upon a purely mutual basis under the laws of New York, and its members, as has been well said in many cases, are essentially partners in a common enterprise, in the burdens and benefits of which they must mutually share.

Ch. 122, Laws of N. Y. of 1851, *ante* p. 47.

Tindall, *C. J.*, in Silver *v.* Barnes, 6 Bing. N. C., 180; 8 Scott, 300; 37 Eng. Com. L. Rep., 335.

Burbridge *v.* Cotton, 5 De G. & Sm., 17; 21 L. J. Ch., 201; 8 Eng. L. & Eq., 57.

Seagrave *v.* Pope, 1 De G., M. & G., 783; 22 L. J., Ch., 258; 15 Eng. L. & Eq., 477.

Cutbill *v.* Kingdom, 17 L. J., Eq., 177; 1 Exch., 494.

In re Durham Co. (Davis Case, Wilson's Case), Law Rep., 12 Eq., 516; 25 L. T. N. S., 83.

Robertson *v.* Homestead Assn., 10 Md., 397; 69 Am. Dec., 145.

Patterson *v.* Workingmen's B. & L. Assn., 14 Lea (Tenn.), 677.

Engelhardt *v.* Fifth Ward Assn., 148 N. Y., 281.

People *v.* Lowe, 117 N. Y., 175, 180.

Tilley *v.* Am. B. & L. Assn., 52 Fed. Rep., 618, 622.

Thompson on Building Associations (2nd Ed.), §§ 3, 4.

"A mutual savings fund and loan association is purely a co-operative society, consisting of a part-

nership in the profits of money as a money maker, equitably distributed in proportion to the severalties of capital furnished by the individual members thereof."

Wrigley on Building Associations, p. 16.

The Greenwich Union Building Society, the first English society regularly established, was founded by a deed of rules and regulations, dated the 7th of January, 1809. The membership of that society was by its articles limited to fifty members. The maturity value of the shares was fixed at 210 pounds, and it was provided that the payments of members should continue "until the final close of the society by each member having paid his 210 pounds on every share held by him."

Davis on Building, &c., Societies (3d Ed.), pp. 1-3.

The legality of the organization of this first formally authorized building and loan association was considered and established in the early case of *Pratt* v. *Hutchinson*, 15 East., 511, and the system of building and loan associations since established upon similar plans is now world wide.

From the time of the legal organization of the Greenwich Union Building Society, there has been steady growth and progress among societies of like character, and in England, Australia, the United States and all English-speaking countries, their growth has been phenomenal, and when properly organized and protected by proper legislation and equitable decisions of the courts, building associations have been more uniformly successful and profitable to their members than any other form of co-operative investment societies. From recent statistics, it appears that "there are more than 3,500 associations on the Island of Great Britain and the Continent of Australia, with assets of more than $300,000,000, and we have in the United States more than 6,000 associations with not less than $700,-

000,000 of assets, making a grand total of 10,000 associations with more than $1,000,000,000 in assets in these two English speaking countries alone."

Quoted from Report of Bird M. Robinson, Secretary, made to the Inter-State League of Building and Loan Associations, Nov. 24, 1896.

The Hon. Carroll D. Wright, in his ninth annual report as Commissioner of Labor, reports upon the building and loan associations of the United States. That report was made in 1893, and was based upon most careful and thorough research. In the introduction to the report and in chapter 1 of the report, which summarizes the general tables, much valuable information will be found upon the general subject of building and loan associations in the United States, their business methods and principles of operation, and an examination of these two chapters will, no doubt, serve to remove many erroneous impressions which are currently prevalent, and which, we regret to say, have tinctured the decisions of the courts in numerous cases. Mr. Wright, describing a building and loan association, says: "It is seen, therefore, that every member of a building and loan association must be a stockholder; but the difference between a stockholder in such an association and that in an ordinary corporation for usual business purposes lies in the fact that in the latter the member or stockholder buys his stock and pays for it at once, and usually is not called upon for any further payments. * * * In the building and loan association, on the contrary, the stockholder or member pays a stipulated sum, say, $1, when he takes his membership and buys a share of stock. He then continues to pay a like sum each month until the aggregate of sums paid, augmented by the profits, amounts to the maturing value of the stock, usually $200, and at this time the stockholder is entitled to the full maturing value of the share, and surrenders the same. It is seen clearly,

then, that the capital of a building and loan association consists of the combined savings of its members, paid to the association upon shares of stock, increased by the interest and premium which the association has received from loans made by it from the savings of its members thus paid to the association, and from all other sources of income. The amount of the capital of the association, therefore, increases from month to month and year to year."

9th Annual Report, U. S. Commissioner of Labor (1893), p. 12.

Speaking of the alleged distinction between so-called local and national associations, Mr. Wright says: "The terms 'local' and 'national' have been used. A local building and loan association and a national building and loan association conduct their business under substantially the same method. The local association, however, confines its operations to a small community, usually to the county in which located, while the national operates on a large scale, extending its business enterprise far beyond the borders of its own State, even. * * * At the present time the prejudice which has existed for many years against nationals is being overcome, and they are conducting their business, as a rule, with the same integrity that the locals display in the conduct of their affairs."

Ninth Annual Report, U. S. Commissioner of Labor (1893), p. 16.

There is no material distinction between the general plan of the Eastern Building and Loan Association and the English Building Societies. An English work upon building societies thus describes the associations as they now exist in that country: "A permanent society means a society which has not, by its rules, any fixed date or specified result at which it shall terminate. These are decidedly the best of all societies, as they contain more of the ele-

ments of certainty and equity, if the rules are properly drawn and observed. Shares are issued upon which the various members make payments, either in one sum, when the share is said to be 'paid up,' or by periodical or other sums, the interest in either case being allowed to accumulate until the share has reached the full value prescribed by the rules, or else paid out yearly to the member as he may prefer. Advances are made to members, repayable by small periodical instalments extending over a fixed term of years; and the rules generally allow the borrower to choose any term from three to twenty years, over which the repayment may be spread equally. Practically, most of the best societies discharge the functions of land mortgage banks. On the one hand, they receive money in such a variety of ways as to meet the requirements of all classes of investors, and at a rate of interest higher than that of the ordinary savings bank; on the other hand, they lend the money out on mortgages, obtaining a higher rate of interest, it is true, than ordinary mortgagees, but granting facilities for repayment which private mortgagees could not afford."

Davis on Building, etc., Societies (3rd Ed.), Ch. 2, § 3, p. 69.

The nature and objects of a building and loan association are well shown by the following descriptive definition: "The building association as now existing is a private corporation designed for the accumulation, by the members, of their money, by periodical payments into its treasury, to be invested from time to time in loans to the members upon real estate for home purposes, the borrowing members paying interest, and a preference in securing loans over other members, and continuing their fixed periodical instalments in addition, all of which payments, together with the non-borrower's payments, including fines for failure to pay such fixed instalments, forfeitures for such continued failure of such

payments, fees for transferring stock, membership fees required upon the entrance of the member into the society, and such other revenues, go into the common fund until such time as that the instalment payments and profits aggregate the face value of all the shares in the association, when the assets, after the payment of the expenses and losses, are prorated among all the members, which, in legal effect, cancels the borrower's debt, and gives the non-borrower the amount of his stock."

Thompson on Building Associations (2nd Ed.), § 3.

This being the first case that has come before this Court calling for a determination of the status and rights of members of a building and loan association *engaged in the transaction of an interstate business*, and commonly known as a "National" Association, and, indeed, being the first case wherein the rights of building and loan associations and their members have been before this Court for determination, we have deemed it proper to preface the examination of the particular questions involved in the case at bar with the foregoing authorities, showing the nature and corporate characteristics of the Eastern Building and Loan Association and the status of the appellant H. L. Bedford as a shareholder therein. Indeed, until the character of the corporation is apprehended and the relations of appellants to it are understood, the very important questions arising upon the face of the record in this case, including the grave constitutional questions submitted to this Court by the Judges of the Circuit Court of Appeals for the Sixth Circuit, cannot be properly apprehended or intelligently determined.

II.

The appellee is in all essential characteristics just such an association as those to which the foregoing authorities refer and which they describe. It is a corporation of a class which has met with approval in the courts of many States, and the contracts of appellee and like associations with individual shareholders, borrowing and non-borrowing, have been the subject of judicial consideration in numerous cases in the courts of New York.

"However it may be elsewhere, Philadelphia has become emphatically a city of comfortable homes for the poor by means of these organizations."

Sharswood, *J.*, in

Becket *v.* Uniontown B. & L. Assn., 88 Pa. St., 211, 216.

And in the courts of New York the contracts of such associations with their members have been almost uniformly sustained, and the rights and privileges of both the associations and the members in that State are well settled.

Concordia, &c., Assn. *v.* Read, 93 N. Y., 474.

People *v.* Lowe, 117 N. Y., 175.

People *ex rel.* Fairchild *v.* Preston, 140 N. Y., 549.

O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.

Heslin *v.* Eastern B. & L. Assn., 28 Misc. (N. Y.), 376.

Eagle Savings & Loan Co. *v.* Samuels, 43 App. Div. (N. Y.), 386.

People *v.* Bankers' Loan, etc., Co., 13 Misc. (N. Y.), 221.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

These views of the contract rights of appellee and like associations have been accepted by the Courts

of other States, and in a very recent case to which the appellee was a party, by the Supreme Court of Tennessee.

Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.

III.

There cannot be the slightest doubt that the plan and method of operation of appellee are in strict accordance with the laws of New York and that its contracts with its shareholders, both "advanced" and "non-advanced" are to be construed in accordance with its articles of incorporation, by-laws and the laws of New York.

Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

O'Malley *v.* People's B. & S. Assn., 92 Hun (N. Y.), 572.

Eagle S. & L. Co. *v.* Samuels, 43 App. Div. (N. Y.), 386.

Western Mass. Fire Ins. Co. *v.* Hilton, 42 App. Div. (N. Y.), 52.

"The contract between the plaintiff and the defendant is to be ascertained from the certificates issued to the plaintiff, the by-laws of the defendant and the statutes of this State for the organization and operation of building and loan associations."

Gaynor, *J.*, in Heslin *v.* Eastern Building & Loan Assn., 28 Misc. (N. Y.), 376, 378.

Concordia Assn. *v.* Read, 93 N. Y., 474.

IV.

Nor can it be successfully denied that appellant H. L. Bedford, although a citizen and resident of Tennessee, now and at the time he became a member of the appellee association, is, as to his contract of membership in appellee and his obligations assumed in connection therewith as an "advanced" or borrowing shareholder, bound by the articles of association and by-laws of appellee, and by the construction given to such articles and by-laws by the courts of New York.

Canada So. R. Co. *v.* Gebhard, 109 U. S., 527, 537.

Relfe *v.* Rundle, 103 U. S., 222, 225, 226.

Chicago, &c. Co. *v.* Wiggins Ferry Co., 119 U. S., 615, 622.

Clark *v.* Mutual Reserve Fund Life Assn. (D. C.), 43 L. R. A., 390, 395.

Sulz *v.* Mut. Reserve Fund Life Assn., 145 N. Y., 563, 568.

Ware *v.* Bankers' Loan, &c., Co., 95 Va., 680; s. c., 64 Am. St. Rep., 826.

Smith *v.* Taggart, 87 Fed. Rep., 94, 96, 97.

Engelhardt *v.* Fifth Ward Loan Assn., 148 N. Y., 281, 285.

3 Thompson on Corp., § 3046.

5 Thompson on Corp., § 5987.

Shaw *v.* Quincy Mining Co., 145 U. S., 444, 449, 450, 451, 452.

Hawkins *v.* Glenn, 131 U. S., 319, 331, 332.

Glenn *v.* Liggett, 135 U. S., 533, 544.

V.

But the contention of appellants upon this point is, that appellee was, in the making of the "advance" upon his shares to Bedford, "doing business" in Tennessee in violation of the laws of that State, not having complied with the acts of Tennessee regulating the right of foreign corporations and especially of foreign building and loan associations to do business in that State, and that, therefore, the obligations assumed by Bedford as a stockholder in appellee, the notes executed by him to appellee and the mortgage given upon real estate in Tennessee to secure such obligations and notes are illegal contracts, void and against public policy in that State, and therefore non-enforcible, not only in the State courts but in the Federal courts as well.

We meet this contention with the following propositions of law and fact namely:

I.—Contract Obligations: Vested Rights Under: Subsequent Legislation. Bedford's contract of membership, stock certificate, obligation to make payments of "dues" upon his stock and right as a member of appellee to receive an "advance" of the par or maturity value of his shares, all antedated the acts of the Legislature of Tennessee of March 26 and March 28, 1891, upon which he now relies to help him escape from his contract to pay to appellee dues upon his stock and interest and premiums upon the amount of the advance to him (*ante*, pp. 57–59, fols. 171–177)

We concede the rule to be that a State corporation, not engaged in interstate commerce, cannot carry on or transact business in a State other than that of its corporate *situs*, except by the consent of such other State, either expressly given or implied, upon principles of interstate comity.

Hooper *v.* California, 155 U. S., 648, 652.

Waters-Pierce Oil Co. *v.* Texas, 177 U. S., 28, 46.

We also concede that such permission or authority may be revoked or annulled, so far as *future* business is concerned.

Doyle *v.* Continental Ins. Co., 94 U. S., 535, 537.

Insurance Co. *v.* Morse, 20 Wall., 445, 450.

But we deny that such revocation of consent or authority can apply to existing contracts and obligations of such corporation in the foreign State, or to contracts and obligations of individual citizens of that State to it. And we deny that rights acquired and vested by contract relations existing between such corporation and individual citizens of a foreign State can be divested, or the obligation of the contracts impaired by State legislation limiting or withdrawing the right of the foreign corporation to transact business in such State. It is only *future*, not *past*, business and contracts that can be affected by such legislation.

We submit that the contract rights of Bedford, as a member of appellee, to receive an "advance" of the par or maturity value of his shares, and of appellee to make such "advance," cannot be impaired by subsequent State legislation, even though the "advance" to Bedford was made after the passing of the laws of 1891, and without compliance therewith upon the part of appellee.

American B. & L. Assn. *v.* Rainbolt, 48 Neb., 434; 67 N. W. Rep., 493, 498-500.

Von Hoffman *v.* Quincy, 4 Wall., 535, 553.

Shreveport *v.* Cole, 129 U. S., 36, 42.

Steamship Co. *v.* Joliffe, 2 Wall., 450, 457, 458.

County of Clay *v.* Society for Savings, 104 U. S., 579, 590.

Red Rock *v.* Henry, 106 U. S., 596, 604.

Cooper *v.* Ferguson, 113 U. S., 727, 736.

Osborn *v.* Nicholson, 13 Wall., 654, 656.

Long *v.* Walker, 105 N. C., 94; 10 S. E., 858, 859.

Nevada Bank *v.* Steinmitz, 64 Cal., 316; 30 Pac., 970-974.

Tufts *v.* Tufts, 8 Utah, 146; 30 Pac., 309-310.

Garneau *v.* Port Blakesley Mill Co., 8 Wash., 471; 36 Pac., 463-464.

Bedford's right to an "advance" from the appellee became vested when he became a stockholder in January, 1891. No subsequent State legislation could impair that right. He made application for the "advance" on March 20, 1891, *before the passage of the Acts of March 26th and 28th*, and thereby indicated his purpose to avail himself of his right to an "advance." The "advance" was granted *by the act of the board of directors of appellee, passing upon the application in Syracuse, N. Y.*, on May 18, 1891. Such action of the board in New York was not in violation of the Tennessee statutes that had been passed and taken effect between the date of the application for the loan and the date that it was granted in New York. The mere execution of the notes and mortgage in Tennessee at a subsequent date in closing the contract up, the notes being made payable in New York, cannot change the rights of the parties which had attached long before. The Tennessee Acts, if construed to make this contract void, are themselves unconstitutional, because they impair the obligations of a contract, seek to divest vested right, and, so far as Bedford is concerned, might well be held to interfere with his rights, privileges and immunities as a citizen of the United States.

Korn *v.* Mutual Assurance Soc., 6 Cr., 192, 199.

White *v.* Hart, 13 Wall., 646-654.

The Homestead Cases, 22 Gratt., 266; 12 Am. Rep., 507, 515.
American B. & L. Assn. *v.* Rainbolt, 48 Neb., 434; 67 N. W. Rep., 493, 498–500.

It makes no difference whether the contract between the parties was executory or executed, so far as the protection of the constitutional provision against the impairment of the obligation of contracts by State legislation is concerned.

Charles River Bridge *v.* Warren Bridge, 11 Pet., 420, 573.
Fletcher *v.* Peck, 6 Cr., 87, 135–139.

And implied as well as express contracts are protected.

Fisk *v.* Jefferson Police Jury, 116 U. S., 131, 134.
Gunn *v.* Barry, 15 Wall., 610, 622, 623.

While the appellee, being a corporation, cannot claim the benefits of the privileges and immunities secured to citizens of the several States by the Federal Constitution, yet appellant Bedford was protected by those constitutional guarantees at the time he secured the "advance" of the par or maturity value of his shares by the appellee. He secured that "advance" because of his legal rights as against the appellee under his contract of membership, and the constitutional provisions protected him, so far as that transaction was concerned, against the provisions of the Tennessee Acts of March 26, 1891, he being entitled, notwithstanding his residence in Tennessee, to the same privileges and immunities belonging to a citizen of New York and, under the laws of New York, having the rights attaching to membership in appellee as a New York corporation. In short, the rights of Bedford as a member of appellee were exactly the same as the rights of any New York share-

holder, and a mere exercise by him of those rights in the State of Tennessee was no violation of the Tennessee Acts of March 26, 1891, and, having exercised his rights of membership under his contract of membership with appellee, and in accordance with the laws of New York, appellant Bedford is certainly now estopped from claiming that the contract into which he entered was illegal and void under the laws of Tennessee.

Waters Pierce Oil Co. *v.* Texas, 177 U., S., 28, 45.
Blake *v.* McClung, 172 U. S., 239, 250.
New York *v.* Roberts, 171 U. S., 658.
Chubb *v.* Upton, 95 U. S., 665.

II.—WAS THE TRANSACTION BETWEEN BEDFORD AND APPELLEE INTERSTATE COMMERCE? We do not concede that appellee, in its transactions with appellant Bedford was not engaged in interstate commerce. On the contrary, we insist that the appellee, so far as its business in Tennessee is concerned, was engaged in interstate commerce, and that the transactions between Bedford and appellee were "commerce" and "commerce between the States" at that.

Cooper Manufacturing Co. *v.* Ferguson, 113 U. S., 727, 736. Concurring opinion of Justices Matthews and Blatchford.

True, it has been held that contracts of insurance are not commerce, being mere contracts of indemnity against loss.

Paul *v.* Virginia, 8 Wall., 168, 183.
Liverpool Ins. Co. *v.* Mass., 10 Wall., 566, 573.
Hooper *v.* California, 155 U. S., 648, 653, 654.
New York Life Ins. Co. *v.* Cravens, 178 U. S., 389.

And it has also been held that a broker, engaged in the sale and transfer of foreign bills of exchange, was not engaged in the transaction of interstate commerce, and, therefore, was not exempted from a State law imposing a tax on exchange and money brokers.

Nathan *v.* Louisiana, 8 How., 73, 80.

But in that case it was conceded that "money is * * * an instrument of commerce, and so is a bill of exchange." And the law is now well settled that a State tax upon an instrument of interstate commerce is unconstitutional.

Western U. Tel. Co. *v.* Pennsylvania, 128 U. S., 39.

Ratterman *v.* W. U. Tel. Co., 127 U. S., 411, 423.

Le Loup *v.* Port of Mobile, 127 U. S., 640.

And from this it necessarily follows that a State law prohibiting a foreign corporation from doing business in such State, if construed as preventing a citizen of the State from executing a promissory note payable to such foreign corporation in the State of its corporate *situs*, would be a regulation of an instrument of interstate commerce, and, therefore, within the inhibition of the Federal Constitution.

Hamilton's Works (Lodge's Ed.), Vol. 3, pp. 179, 203.

Prentice on "The Commerce Clause," 47, 48.

Osborn *v.* U. S. Bank, 9 Wh., 738, 859, 867.

Likewise, a law preventing a foreign corporation from accepting such a promissory note payable at the corporate domicile and transmitting in exchange therefor, either in currency or by draft, money advanced to the maker of the note, would be an un-

constitutional interference with interstate commerce.

Welton *v.* Missouri, 91 U. S., 275, 277.

And it seems to be settled law that the mere taking of foreign security, such as a mortgage to secure the payment of the note delivered at the corporate domicile, "does not alter the locality of the contract." "Taking foreign security, does not necessarily draw after it the consequence that the contract is to be fulfilled where the security is taken. Legal fulfillment of a contract of loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows, unless another place of payment be expressly designated by the contract. No tender would have been effectual to discharge the mortgagee unless made in Rhode Island."

DeWolf *v.* Johnson, 10 Wh., 367, 383.

It is left unsettled, so far as the decisions of this Court are concerned, whether the sending of a note from one State to another to be discounted in the latter State, is interstate commerce.

Bamberger *v.* Schoolfield, 160 U. S., 149, 167.

But, we do not see how it can be gainsaid that the appellant Bedford as a member of the Eastern Building and Loan Association, in making application to it for an "advance," having that application granted in New York, then executing his notes payable in New York and transmitting them to the appellee in that State where they were accepted, receiving in exchange, by a draft payable in New York, the money representing the "advance," collecting that draft in New York and securing his notes payable in New York by the execution of a mortgage upon Tennessee property, was engaged in dealing with the instruments of commerce, and was

throughout in his dealings with appellee upon this subject, engaged in the transaction of interstate commerce. The determination of what is commerce between the States rests upon the general commercial usages of the country and the construction of the commerce clause of the Federal Constitution by this Court.

Schollenberger *v.* Pennsylvania, 171 U. S., 1.

Bowman *v.* Railway Co., 125 U. S., 465, 501.

It is not an essential of interstate commerce that there shall be a transportation of goods or merchandise between States. "Interstate commerce consists of intercourse and traffic between the citizens and inhabitants of different States and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale and exchange of commodities."

Addyston Pipe & Steel Co. *v.* United States, 175 U. S., 211, 241.

Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196, 203.

Kidd *v.* Pearson, 128 U. S., 1, 20.

County of Mobile *v.* Kimball, 102 U. S., 691–702.

Certainly the transaction in the case at bar was both "intercourse" and "traffic" between citizens and inhabitants of different States.

FIRST.—Appellant Bedford subscribed for a part of the capital stock of the appellee, agreeing to pay for such stock in monthly installments, called dues, and by such purchase of stock in the appellee he acquired, as a stockholder, an undivided interest in the corporate properties at the corporate *situs*.

Murfree on Foreign Corp., § 381;

Bank of Augusta *v.* Earle, 13 Pet., 519;

Plimpton *v.* Bigelow, 93 N. Y., 592;
Moore *v.* Gennett, 2 Tenn. Chy., 375;
Youngs *v.* South Tredegar I. Co., 85 Tenn., 189; 4 Am. St. Rep., 752;

And also a right to participate in the profits of the corporation,

Endlich on Building Assns. (2d ed.), § 469;
Plimpton *v.* Bigelow, 93 N. Y., 592, 599;
Burrall *v.* Bushwick R. Co., 75 N. Y., 211, 216;
People *ex rel.* Wiebusch, &c., Co. *v.* Roberts, 154 N. Y., 101, 107;

such profits being applied, in building and loan association parlance, for the purpose of "maturing" his stock, that is, of carrying the stock to its face or par value in advance of the time when Bedford's mere payment of "dues" upon the stock would mature it.

"When the payments to the association, together with the distributive profits after the deduction of expenses, equal the face value of the stock, then the stock is matured; the certificates are then called in and the holder receives the face value thereof in cash, unless he is a borrower of the association, and in that event his indebtedness is canceled."

Thompson on Building & Loan Assns. (2d ed.), § 4, p. 9; see also *Id.*, § 134, p. 258, and § 190, p. 378.

SECOND.—As a part of the privileges incident to his membership in the corporation, granted to him in consideration of his subscription for its stock, Bedford acquired the absolute right to have advanced to him, upon the terms fixed by the articles of incorporation and by-laws of the appellee, the par or maturity value of his stock, the only condition necessary to be complied with upon his part being an observance of the rules and regulations of the

association and the giving of adequate real estate security for the "advance."

Endlich on Building Assns. (2d ed.), §§ 20, 88.
7 Thompson on Corp., §§ 8724, 8726.

THIRD.—Bedford availed himself of this privilege by the application which he signed on March 20, 1891, and the "advance" was subsequently made to him as heretofore set forth in detail (*Ante*, pp. 59-63, fols. 177-188), and as an incident of this transaction, executed his notes to appellee, payable at Syracuse, N. Y., and secured the same by the execution of a mortgage upon property in Tennessee. It will be noted that the notes and mortgage executed by Bedford include and cover the indebtedness and obligations of Bedford on account of his subscription for stock, and, therefore, both the notes and the mortgage are given, in part at least, to secure the performance of an obligation antecedent to the enactment of the Tennessee laws of March 26, 1891, and antecedent also to the obligations of Bedford growing out of the "advance" to him, granted upon his application of March 20, 1891.

Ante, pp. 12-15, fols. 36, 37, 38, 42, 43, and pp. 56, 57, fols. 166-170.

FOURTH.—Viewed in its proper light, the notes and mortgage of Bedford to appellee do not, in reality, secure the repayment of a loan of money, *but only obligate Bedford to comply with the articles of incorporation and by laws of the appellee*, and make payment to it, at its home office in Syracuse, of dues upon his stock and premiums and interest upon the "advance" to him until such time as the stock should mature, at which date he would become entitled to set-off the maturity value of his stock against the "advance" that had been made to him, and demand the cancellation of his mortgage.

Notwithstanding the execution of the notes and

the fixing of a definite number of payments and a definite amount to be paid, it is settled by repeated decisions of the courts of New York and by one decision in Tennessee that such notes represent only an estimated period of stock maturity in the appellee, and are not binding as a definite contract that the number of payments or the amount to be paid may not exceed the sum stipulated in the notes and mortgage.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y), 163.
Heslin *v.* Eastern B. & L. Assn., 28 Misc. (N. Y.), 376.
O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.
Miller *v.* Eastern B. & L. Assn., 53 S. W. Rep., 231 (Tenn.).

Is not such a transaction as this between a corporation of New York and its stockholder in Tennessee, involving traffic in the corporate stock and a transfer of negotiable securities for money, when consummated in the manner that this transaction was, interstate commerce within the meaning of the Federal Constitution?

It is settled law that the business of transmitting telegraphic messages between the States is protected by the commerce clause of the Constitution, such messages being regarded as instruments of commerce, and, consequently, not subject to State control.

LeLoup *v.* Port of Mobile, 127 U. S., 640, 645.
Telegraph Co. *v.* Texas, 105 U. S., 460.
Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S., 1.

And so it is established that a "drummer" engaged in soliciting the purchase of articles of commerce by the citizens of a State, cannot be subjected to a license tax by such State, because this

would establish an unconstitutional regulation of commerce between the States.

Robbins *v.* Shelby Co. Taxing Dist., 120 U. S., 489.

Nor can any State exclude from its territory a corporation engaged in interstate commerce.

Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727.
Crutcher *v.* Kentucky, 141 U. S., 47.
Steamship Co. *v.* Pennsylvania, 122 U. S., 326.
Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 196.
Railroad Co. *v.* Husen, 95 U. S., 465, 470.
Sherlock *v.* Alling, 93 U. S., 99, 103.

Nor can any State impose any conditions on the transaction of interstate commerce within such State.

Chy Lung *v.* Freeman, 92 U. S., 275.
New York *v.* Compagnie, etc., 107 U. S., 59.
Henderson *v.* The Mayor, 92 U. S., 259.
Brown *v.* Maryland, 12 Wh., 419.
Fritts *v.* Palmer, 132 U. S., 282.
Holder *v.* Aultman, 169 U. S., 81.

In the light of these principles and authorities we respectfully invoke the opinion of this Court as to whether or not the transaction between the appellant Bedford and the appellee does not constitute commerce between the States within the meaning of the Federal Constitution.

III.—THE FOURTEENTH AMENDMENT: DOES IT PROTECT THE APPELLEE? The Tennessee Statutes of March 26, 1891, if given the construction contended for by appellants, not only impair the obligation of a contract but deny to appellee "the equal protec-

tion of the laws" of the State of Tennessee which is guaranteed to all persons within the jurisdiction of any State by the XIVth Amendment to the Constitution of the United States.

Santa Clara Co. *v.* Southern Pacific R. R., 118 U. S., 394.
Crutcher *v.* Kentucky, 141 U. S., 47.
Cooper Mfg. Co. *v.* Ferguson, 113 U. S., 727.
Steamship Co. *v.* Pennsylvania, 122 U. S., 327.
Gloucester Ferry Co. *v.* Pennsylvania, 114 U. S., 205.

Within the meaning of this clause of the amendment, a corporation is a "person" entitled to the equal protection of the laws.

Pembina Mining Co. *v.* Pennsylvania, 125 U. S., 181.
Minneapolis R. Co. *v.* Beckwith, 129 U. S., 26.
Smyth *v.* Ames, 169 U. S., 466.

Hence, we submit that to pass laws depriving Tennessee stockholders in a New York corporation of their rights as stockholders to the benefits of the corporate organization, and making their contracts with the New York corporation void and unenforcible in the courts of Tennessee, merely because of the giving of a mortgage upon Tennessee property to secure the performance of the stockholder's obligations to the corporation, would be a denial of the equal protection of the laws.

Allgeyer *v.* Louisiana, 165 U. S., 578.
Hopkins *v.* United States, 171 U. S., 578, 602, 603.
United States *v.* Joint Traffic Ass'n, 171 U. S., 505, 572.
West Mass. Fire Ins. Co. *v.* Hilton, 42 App. Div. (N. Y.), 52.
Milliken *v.* Pratt, 125 Mass., 374.
Tilden *v.* Blair, 21 Wall., 241.

The right of appellee, a corporation of New York, to enter into contracts under the laws of New York with appellant Bedford, a citizen of Tennessee, the State of Tennessee cannot by its laws either abridge or deny.

R. S. U. S., § 1977.
Yick Wo. *v.* Hopkins, 118 U. S., 356, 369.
Santa Clara County *v.* So. Pac. R. Co., 118 U. S., 394, 396.

And such contracts, when to be performed in New York by the payment of Bedford's notes and obligations in that State at the home office of the corporation of which he was a member and in strict compliance with the laws of New York and the corporate charter, and for the purpose of discharging the obligations assumed by Bedford as a member of the corporation, are beyond the reach of legislation by the State of Tennessee; and the mortgage to secure the payment of such notes and obligations is enforcible in the Federal courts in Tennessee without regard to State legislation intended to invalidate the contract.

Allgeyer *v.* Louisiana, 165 U. S., 578.
Holden *v.* Hardy, 169 U. S., 366, 391.
Lauter *v.* Jarvis-Conklin Mortgage Co. (C. C. A.), 85 Fed. Rep., 894.
Jarvis-Conklin Mortgage Co. *v.* Willhoit, 84 Fed. Rep., 514.
Cæsar *v.* Capell, 83 Fed. Rep., 403.

Compare:

Civil Rights Cases, 109 U. S., 3, 16, 17
Gibson *v.* Mississippi, 162 U. S., 565, 582, 583.
Neal *v.* Delaware, 103 U. S., 307.
Robbins *v.* Shelby Taxing Dist., 120 U. S., 489, 497.
Ex parte Virginia, 100 U. S., 339, 346, 347.

"Doubts may at one time have existed upon the subject but it is now well settled that a State law cannot discharge or suspend the obligation of a contract made in another State if it was legal where it was made and was a contract with a citizen of another State, not even if it was to be performed in the State whose law is invoked to defeat the remedy."

Clifford, Justice, in Green *v.* Collins, 3 Cliff., 494; s. c., Federal Cases No. 5755.

Nor does it make the slightest difference in this doctrine that the notes payable in New York were executed in Tennessee and secured by a mortgage upon real property in that State.

Ware *v.* Bankers' Loan & Investment Co., 95 Va., 680; s. c., 64 Am. St. Rep., 826.

Bennett *v.* Eastern B. & L. Ass'n, 177 Pa. St., 233; s. c., 55 Am. St. Rep., 723.

Bank of Harrison *v.* Gibson, 60 Ark., 269.

Andrews *v.* Pond, 13 Pet., 65, 78.

Scudder *v.* Union Bank, 91 U. S., 411.

Scotland County *v.* Hill, 132 U. S., 117.

Coghlan *v.* South Carolina R. Co., 142 U. S., 110.

Mutual Life Ins. Co. *v.* Phinney, 178 U. S., 327, 328.

London Assurance *v.* Companhia de Moagens, 167 U. S., 161.

Brown *v.* Jones, 125 Ind., 379; s. c., 21 Am. St. Rep., 230.

Burckle *v.* Eckhart, 3 N. Y., 135.

Abt. *v.* American, &c., Bank, 159 Ill., 467; s. c., 50 Am. St. Rep., 170.

Shoe, &c., Bank *v.* Wood, 142 Mass., 563.

Orcutt *v.* Nelson, 1 Gray, 536.

Johnston *v.* Gawtry, 83 Mo., 339.

The by-laws of the appellee required all payments to be made by both "advanced" and unadvanced members at the home office in Syracuse, and this applied not only to "dues" or "calls" upon stock, but also to payments of "premiums" and "interest" by "advanced" or borrowing members.

By-Laws, Art. XIX., §§ 1, 3, 10, 11, 12, 14, 16; Transcript, pp. 59-62.
Andruss *v.* Peoples' B. L. Assn. (C. C. A.) 94 Fed. Rep., 575.

The notes were all made payable at the home office of the appellee, in Syracuse.

Ante, p. 63, fols. 187, 188;
Transcript, pp. 71, 77.

And the mortgage expressly recognizes this fact and binds appellant Bedford to pay the notes in New York.

Transcript, p. 23.

Does it not follow that any construction of the laws of Tennessee which would invalidate these notes and make unenforcible this mortgage, would deprive the appellee of the equal protection of the laws and of its property without due process of law, and would not any laws necessarily so construed be unconstitutional and void? In the light of many leading cases above cited it would seem so.

IV.—THE PLACE OF CONTRACT: THE LAW OF NEW YORK GOVERNS: "DOING BUSINESS." That appellee in making the "advance" to appellant Bedford and accepting the notes and mortgage to secure his obligations to the corporation was not "doing business" in Tennessee within the meaning of the Tennessee laws which appellants invoke is, as we believe, manifest upon the face of the record.

The purchase of stock in a corporation of another State, even though it is done through a

soliciting agent in the State of the residence of the purchaser, is not "doing business" in that State in violation of the laws thereof forbidding the transaction of business in such State by foreign corporations.

Payson *v.* Withers, 5 Biss., 272, Opinion per Gresham, *J.*

Nor is the lending of money to a citizen of a State where a foreign corporation is not authorized to do business, and the acceptance of a mortgage upon lands in such State for the purpose of securing the repayment of the loan, "doing business" within such State when the notes secured by the mortgage are made payable in the State of the corporate domicile and the contract is a unilateral one.

Caesar *v.* Capell, 83 Fed. Rep., 403.
Sullivan *v.* Sheehan, 89 Fed. Rep., 247.
Neal *v.* B. & L. Assn., 100 Tenn., 607.
Andruss *v.* People's B. & L. Assn., 94 Fed. Rep., 575.

But, in the case at bar, there was no mere lending of money and the execution of notes and a mortgage to secure repayment. The transaction was of a totally different nature, and far less susceptible of being construed as the "doing of business" in the prohibited State by a foreign corporation.

"It is abundantly established by the decisions of the United States Courts that no matter what business a corporation does in another State, its residence is exclusively in the State of its creation."

Reimers *v.* Seatco Mfg. Co. (C. C. A.), 70 Fed. Rep., 573, 577.
Shaw *v.* Quincy Mining Co., 145 U. S., 444, 449, 450.

Hence, the appellee was not in any sense present in Tennessee in the dealings with appellant Bedford. Bedford became a stockholder in appellee before

the passage of the Tennessee Acts of March 26, 1891. This is not denied.

Ante, pp. 57–59, fols. 171, 172, 173, 174, 177.

Transcript, pp. 26, 27; Deposition of D. A. Pierce.

By his subscription for stock and acceptance of the stock certificate transmitted to him by appellee before the passage of the statutes in question, he became a member of appellee, with all the rights and privileges of membership, as well as subject to its obligations and duties. His application for a loan or "advance" speedily followed his membership and also antedated the Tennessee Acts of March 26, 1891.

Ante, p. 58, fol. 174.

Transcript, p. 63, fol. 79; p. 66, fol. 82.

True, the appraisement of the property offered as security for the "advance" was not made by the "Local Board" at Memphis until May 5, 1891 (*ante*, p. 59, fol. 177), but the application—that is, the offer to contract for an "advance"—was executed by Bedford on March 20, 1891, *six days before* the enactment of the Tennessee statutes of March 26, 1891

Ante, p. 58, fol. 173, ¶ VIII.

And such offer to make a contract and become an "advanced" or borrowing member of appellee was transmitted to appellee at its home office in Syracuse for acceptance or rejection by it.

Ante, pp. 60–61, fols. 178–181.

This was in accordance with the articles of incorporation and by-laws of appellee, by which appellant Bedford, as a stockholder, was and is bound.

Articles of Incorporation, §§ VIII., X.;

Transcript, pp. 44–49.

By-laws, Art. V., § 2; Art XIX., §§ 1, 3, 4, 10, 11, 12, 14, 16;
Transcript, p. 56 and pp. 59-62.

And the by-laws expressly provided that "all applications for loans shall be filed and numbered consecutively as received and be *examined and approved or rejected by the Board* in their regular order."

By-laws, Art. XV., § 1.
Transcript, p. 62.

The by-laws also provide that "all applications for loans are part of the contract of shareholders with this Association."

By-laws, Art. XV., § 2;
Transcript, p. 62.

Hence we submit that when the application for a loan or "advance" by appellant Bedford was "examined and approved" by the Board of Directors of appellee at the home office of the appellee, in Syracuse, on May 18, 1891, a perfectly legal and valid contract was made, and became by such acceptance binding upon the parties, subject only to compliance with conditions precedent by the appellant Bedford, namely, the making of notes payable to appellee at its home office in Syracuse, New York, the pledging of appellant's stock as collateral, and the execution of a mortgage upon the real estate named in the application of March 20th as security for the "advance" or loan applied for.

Ante, p. 60, fols. 179, 180, and Transcript as there cited.
Giddings *v.* Ins. Co., 102 U. S., 108, 111.

And when the notes of appellant, payable to appellee at its home office in Syracuse, New York, together with the mortgage securing the same, were finally transmitted to appellee at Syracuse and there accepted by it, and the money to which appellant Bedford was entitled as an "advance" then paid to

him by New York draft drawn in his favor by appellee and duly received by him, and when he collected the same in New York, as the record shows he did, it seems to us too clear for further argument that the contract obligations of appellant Bedford to appellee arose in New York, under the laws of New York, must be governed and determined by those laws, and that the transaction between appellant Bedford and appellee was not the doing of business by appellee within the State of Tennessee.

Ante, pp. 60-63, fols. 182-188; also *ante*, p. 66, fol. 196.

Having thus presented, from appellee's point of view, the facts and the law regarding the contract relations between appellants and appellee, we now pass to a consideration, in their order, of th several questions certified by the Circuit Court of Appeals, and in this connection will review, so far as we deem necessary, the points made and the authorities cited in appellant's brief herein.

VI.

The first question certified to this Court by the Circuit Court of Appeals is as follows:

"WAS THE VALIDITY OF THE NOTES SIGNED IN TENNESSEE BY THE MAKER, MANUALLY DELIVERED BY HIM TO THE SOLICITING AGENT OF THE ASSOCIATION AT MEMPHIS TO BE TRANSMITTED TO THE ASSOCIATION AT SYRACUSE FOR THE ACCEPTANCE OF THE ASSOCIATION AT THAT PLACE AND PAYABLE AT SYRACUSE, TO BE DETERMINED BY THE LAWS OF TENNESSEE OR OF NEW YORK?"

We submit that the response to this question should be that the validity of the notes is to be determined by the laws of New York, which is the

place of performance. The general principle in relation to contracts made in one place to be performed in another is well settled. They are to be governed by the law of the place of performance.

Miller *v.* Tiffany, 1 Wall., 298, 310.
Andrews *v.* Pond, 13 Pet., 65.
Scotland County *v.* Hill, 132 U. S., 107, 117.
Pritchard *v.* Norton, 106 U. S., 124, 136.
Liverpool, &c., Steam Co. *v.* Phœnix Insurance Co., 129 U. S., 397, 458.
Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 110.
London Assurance *v.* Companhia de Moagens, 167 U. S., 149, 160.
Mutual Life Ins. Co. *v.* Phinney, 178 U. S., 327, 338.

The notes of appellant Bedford were executed to appellee to secure the performance of his obligations as a stockholder and represented his contract to repay to appellee, in the form of "dues," "premiums" and "interest" money which he had obtained from appellee as an "advance" upon his stock under the articles of association and by-laws of the appellee. The notes, therefore, represent merely an honest promise to pay money in the State of New York. If possible, the law of that State should be applied, which will uphold them in their integrity rather than the law of the State which will permit their repudiation.

This being a case in which the laws of Tennessee are invoked by the appellants, decisions of the Supreme Court of that State ought to be of weight upon this question. That Court has many times held that the validity of a note must be determined by the law of the place of payment.

Neal *v.* Building & Loan Assn., 100 Tenn., 697.
Norton *v.* Trust Co. (Ch. App.), 46 S. W. Rep., 544.

Pioneer Loan Co. *v.* Cannon, 96 Tenn., 599.
Hubble *v.* Loan Co., 95 Tenn., 589.
Nelson *v.* Haywood County, 97 Tenn., 782.
Bearden *v.* People's Association (Tenn.), 49 S. W. Rep., 757.

In the first of the Tennessee cases above cited, the notes and mortgage were attacked on the same ground as that here relied on by appellants. The Supreme Court held that they were Louisiana contracts because payable in that State and were, therefore, not affected by the Acts of 1891; this notwithstanding the contracts were all actually made in Tennessee, the corporation being represented by its attorney. The second case was of the same character. The other cases were cases in which the contracts were attacked on the ground of usury. In each instance the notes and trust deeds bore on their face a rate of interest in excess of that allowed in Tennessee, and this, under the Tennessee law, made them absolutely void. The contracts were upheld, however, because payable in a State where the rate was legal, and such is the general rule in Tennessee as to contracts usurious in that State, but not usurious at the place of payment.

Bolton *v.* Street, 3 Coldw. (Tenn.), 31.

The leading text writers cite almost innumerable authorities in support of the foregoing propositions.

Story on Conflict of Laws (8th ed.), §§ 291–305.
Story on Bills, §§ 161–172.
Story on Promissory Notes, §§ 161–172.
1 Daniel on Negotiable Instruments (edition of 1891), p. 930.
Dicey on Conflict of Laws, pp. 616,617.

Appellants, in their brief, doubt the meaning of the Circuit Court of Appeals as expressed in this

question, and say, "We understand the question to be based simply on the idea that the notes were payable in New York" (Appellant's Brief, p. 18). They add: "We contend that the contract in question was closed in Tennessee when Bedford executed the notes and mortgage, and that if his contract be considered a New York contract, it is simply one in the sense of the notes being payable on their face in New York" (Appellant's Brief, p. 18). They further contend: "The contract was closed and made when Bedford in Tennessee signed the notes and mortgage," and they say, "When they were sent on to New York after being signed, it was not for acceptance by the association in the sense that the contract was to be closed by the association's agreeing to it there" (Appellants' Brief, p. 18). The necessary corollary of this proposition is the contention of appellants that the validity of the notes is to be determined by the laws of Tennessee and not by the laws of New York (Appellants' Brief, pp. 18-45). Yet they concede that "a contract is made when and not before it has been executed or *accepted* by *both* parties so as to become binding on both," and they admit that the case from which they quote the above statement held that a contract was an Ohio contract "because of an express stipulation therein that it was not to be valid unless *approved in Ohio.*"

Holder *v.* Aultman, 169 U. S., 89.
Appellants' Brief, p. 20.

This admission, we think, answers and finally disposes of appellants' contention upon the point now under consideration, and if so it will render unnecessary an examination of the numerous cases they subsequently cite in support of their views.

Bedford's contract relations with appellee began when he made application for stock. This application had to be submitted to appellee and accepted by it at its home office in Syracuse, New York.

By-Laws, Art. XIX., § 2;
Transcript, p. 59.

A contract to subscribe for the stock of a foreign corporation is a contract to be performed at the corporate situs.

Penobscot, etc., R. Co., *v.* Bartlett, 12 Gray (Mass.), 244.

Bedford's stock certificate had to be and was issued and signed by the corporate officers at Syracuse, and its issuance constituted an acceptance of the application for stock, and made the contract of membership complete.

By Laws, Art. VI., § 1;
Transcript, p. 56.

The stock certificate, by its terms, provides that "all payments under this certificate are payable at the home office of the association at Syracuse." It also provides that the by-laws of the corporation, "which are attached to and endorsed hereon are a part of this contract, and such by-laws and this certificate shall be construed together as part of the contract between the association and the shareholder."

"Stock certificate," Transcript, pp. 125, 126.

The by-laws require the payment of all sums by way of "dues," "premiums" and "interest" to be made by stockholders to the secretary at the home office.

By-Laws, Art. XIV., § 16;
Transcript, p. 61.

The articles of incorporation, by which Bedford necessarily became bound, and of which he stood charged with notice from the time of his application for membership, specifically provide how and upon what terms and conditions "advances" may be made to members, and stipulate the "premiums" and "interest" to be paid upon "advances," so that all claims in appellants' brief of Bedford's lack

of knowledge and understanding of his agreements go for naught.

Articles of Incorporation, Par. 10;
Transcript, p. 47.

Bedford's application for an "advance" or loan was subsequently made upon a blank furnished by the association (*Ante*, p. 5, fol. 14), and in that application he expressly offers to give and execute notes, and that his wife shall join therein.

Transcript, p. 65, Par. 45.

He also agrees to execute a mortgage, and stipulates that "*all payments are to be paid at such place as the lender may direct.*"

Transcript, p. 64, top of page.

His application for an "advance" or loan having been submitted to the Board of Directors of appellant at the home office in Syracuse, and there examined and approved (*Ante*, pp. 59–61, fols. 177–181), he thereupon addressed a letter to the Board of Directors of appellee at Syracuse, N. Y., asking that an "advance" be "granted" and expressly agreeing to "comply with the charter and by-laws" and all requirements of the board or its committee.

Transcript, p. 67, fol. 84.
Ante, p. 60, fols. 178–180.

"This letter was accompanied by a mortgage to the association, duly executed and acknowledged by Bedford and wife before a notary in Shelby County, Tennessee, of the land in that county previously *tendered as security*. The mortgage had been duly registered in Shelby County."

Transcript, p. 128, "Certificate."

The letter, the mortgage and the notes secured by the mortgage were transmitted through H. B. Martin to the appellee at its home office in Syracuse, New York, *for acceptance there*, no action having previ-

ously been taken upon them by any person in Tennessee, and there being no person in Tennessee with authority to take such action.

Deposition D. A. Pierce, Transcript, pp. 28, 29, 30; Interrogatories 10, 11, 15.
Also Transcript, p. 32, Deposition D. A. Pierce, Interrogatories 19, 20.
Also Transcript, p. 42, Deposition D. A. Pierce, Cross-interrogatory 18.

And thereupon the general attorney of the association, at its home office in Syracuse, having satisfied himself that all the papers were complete, the appellee accepted the notes and mortgage at Syracuse, and consummated the contract by making its draft for the amount to which appellant Bedford was entitled, and transmitting it to him in payment of the loan or "advance." It was a New York draft, and, therefore, its actual collection by Bedford had to be in New York.

Transcript, p. 29, Deposition D. A. Pierce, Int. 15 and ans.
Also Transcript, p. 68, fol. 85.

The notes were all made payable in Syracuse (Transcript, pp. 71-77), and the mortgage was executed, not merely to secure the payment of the notes, but also to secure the payment of all obligations of Bedford to appellee as a stockholder.

Transcript, pp. 7, 8, 9.

Then, as a part of the transaction and by way of collateral or pledge as required by the articles of incorporation and by-laws of the appellee, Bedford's stock certificate was properly endorsed and delivered to the appellee at Syracuse along with the notes and mortgage.

Aule, p. 62, fol. 186.

Upon this state of facts, we submit that the validity of the notes is to be determined by the laws of

New York, and that they are, for all purposes, New York contracts, the minds of the parties having met in New York: *first*, when Bedford's application for stock was granted and the stock certificate was issued to him; *second*, when his application for a loan or "advance" was "examined and approved" by appellee's Board of Directors at Syracuse; and, *third*, when his notes and mortgage were actually accepted and the draft payable to his order was made and transmitted to him, as shown above. Then, and not until then, were all the contracts closed, and all of them, on this state of facts, would seem to be New York and not Tennessee contracts.

In view of these facts, we do not deem it necessary to do more than direct the attention of the Court to the following propositions of law and authorities in support thereof:

The place where payment of a contract is to be made determines the place of its performance, and the law of the place of performance is the law which governs as to the validity and interpretation of the contract.

Wa-hington Central Bank *v.* Hume, 128 U. S., 195, 197, 206.

Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 109.

Mutual Life Ins. Co. *v.* Phinney, 178 U. S., 327, 328.

Assuming that the law of the place of performance must govern in this case as in ordinary cases upon the facts above stated, we are confronted with the further contention upon the part of appellants that the execution of these notes in Tennessee in the manner above stated is a transaction so opposed to the public policy of Tennessee as to be unenforcible in that State, either in the Federal or the State courts. This contention rests upon the ground that the Tennessee Acts of March 26, and March 28, 1891, should be so construed as to render absolutely void

any contract entered into in violation of those acts by a foreign corporation. Appellant's counsel in their brief state this proposition thus: "Now, it would seem from all of the foregoing, that whether the contract in question between Bedford and the Eastern Building and Loan Association was technically made in Tennessee or made in New York, that the question whether it can be enforced in Tennessee is to be governed by Tennessee law. Under Tennessee law the contract is absolutely void, and in any event it was against the public policy of the State as declared in its laws as to foreign corporations and in the decisions of the courts construing such laws."

Appellants' Brief, p. 39.

At the time the contracts between appellants and appellee were entered into, as above stated, the Tennessee laws of March 26 and March 28, 1891, had never been construed by the courts of Tennessee. Indeed, they were not enacted by the Legislature until after the appellant Bedford had become a stockholder in appellee and made his application for an advance (*Aule*, p. 59, fols. 176–177).

Hence, the passage of the Tennessee statutes was subsequent to the inception of the contract relations between the parties, and the first decision of the Supreme Court of Tennessee construing the statutory provisions in question was subsequent to the final consummation of the contracts between appellants and appellee (*Aule*, p. 61, fols. 181–183). There is no contention that prior to the laws of March, 1891, the appellee was prohibited from doing business in Tennessee, or that it was doing business in that State in violation of law.

On this state of facts, the Federal courts are not bound to follow decisions of the Supreme Court of Tennessee construing the statutory provisions in question, but are at liberty in this case to place their own interpretation and construction upon these

Tennessee statutes without regard to State court decisions.

Knox County *v.* National Bank, 147 U. S., 91, 99.
Douglass *v.* County of Pike, 101 U. S., 677, 686.
Carroll County *v.* Smith, 111 U. S., 556, 562, 563.
Pease *v.* Peck, 18 How., 595, 599.

"So, when contracts and transactions have been entered into and rights have accrued thereon under a particular state of decisions, or when there has been no decision of the State tribunals, the Federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the State courts *after* such rights have accrued."

Burgess *v.* Seligman, 107 U. S., 20, 33.
Pleasant Township *v.* Ætna Life Ins. Co., 138 U. S., 67, 73.

"Another well-grounded exception (to the rule that State court decisions construing State statutes will be followed in the Federal courts) exists where contracts and obligations have been entered upon, but there has been no judicial construction of the statutes, upon which the contract or obligation depends, by the highest court of the State whose statute is involved. In such a case, if a court of the United States *obtains jurisdiction of a question touching the validity, effect or obligation of such a contract*, it will, while 'leaning to an agreement with the State court,' exercise an independent judgment as to the validity and meaning of such a contract, although the meaning and validity of State statutes may be an element in the case, and will not be bound to follow opinions of the State court construing such statute *if such decisions were rendered*

after the rights involved in the controversy originated."

Louisville Trust Co. *v.* City of Cincinnati, 76 Fed. Rep., 296, 301 (C. C. A.).

"We are not aware of any decision of the Supreme Court which materially qualifies the declaration in that case (*Burgess v. Seligman*, 107 U. S. 20), and we deem it our duty to give it full force in deciding the question now under consideration. In other words, as the Act of 1871 had not been construed by the Supreme Court of Illinois when the bonds held by the plaintiff were issued, it is the province and duty of this Court to excercise independent judgment as to its validity under the Constitution of Illinois."

Harlan, Circuit Justice, in O'Brien *v.* Wheelock, 95 Fed. Rep., 883, 903, 904.

"We ought not to give to them (State court decisions) a retroactive effect and allow them to render invalid, contracts entered into with citizens of other States, which, in the judgment of this Court, were lawfully made. For, if such a rule were adopted and the comity due to State decisions pushed to this extent, it is evident that the provision in the Constitution of the United States, which secures to the citizens of another State the right to sue in the courts of the United States, will become utterly useless and nugatory."

Rowan *v.* Runnels, 5 How., 134 139, Taney C. J.

Ohio Life Ins. Co. *v.* Debolt, 16 How., 416, 432.

No State statutes can deprive persons having the requisite diversity of citizenship of their constitutional right to invoke the jurisdiction of the Federal courts

in such State for the enforcement of negotiable obligations payable to them in another State.

Hess *v.* Reynolds, 113 U. S., 73, 77.
Chicot County *v.* Sherwood, 148 U. S., 529, 534.
Clark *v.* Bever, 139 U. S., 96.
Arrowsmith *v.* Gleason, 129 U. S., 86, 98, 99.
Rich *v.* Braxton, 158 U. S., 375, 406.
Smyth *v.* Ames, 169 U. S., 466.

It is manifest from these doctrines that the Circuit Court of the United States for the Western District of Tennessee had a perfect right to give its own construction to the Tennessee statutes in controversy, assuming, for the sake of the argument only, that their provisions are applicable to the promissory notes of appellant Bedford made in Tennessee but payable in New York, and the validity of which is now under consideration.

It seems that the Tennessee Act of March 26, 1891, approved March 28, 1891, being Chapter 2 of the Tennessee Acts of 1891, was repealed without qualification or limitation by the Legislature of Tennessee in 1895. Section 1 of the repealing act reads as follows: "Be it enacted by the General Assembly of the State of Tennessee that Chapter 2 of the Acts of 1891, passed March 26, 1891, and approved March 28, 1891, entitled 'An Act to regulate the business of building and loan associations,' and Chapter 114 of the Acts of 1893, entitled 'An Act to amend Chapter 2 of the Acts of 1891,' passed March 26, 1891, and approved March 28, 1891, be, and the same are hereby, repealed."

Acts of Tennessee, 1895, Ch. 114, p. 180.

Hence, the Act of March 28, 1891, thus repealed, cannot be invoked against appellee, non-compliance

with that Act becoming immaterial because of its repeal.

Ewell *v.* Diggs, 108 U. S., 143.
In re Hall, 167 U. S., 38.
Butler *v.* U. S. B. & L. Assn., 97 Tenn., 679.

So far as Chapter 31 of the Tennessee Acts of 1877, Chapter 95 of the Tennessee Acts of 1891 (being the Act of March 17, 1891) and Chapter 122 of the Tennessee Acts of 1891 (approved March 26, 1891) are concerned, it seems that appellee complied therewith by filing an abstract of its charter with the Secretary of State of Tennessee at Nashville, about August 11, 1893, and by filing a similar abstract in the Register's office of Shelby County, Tennessee, about August 15, 1893.

Transcript, p. 16.
"Stipulation," Transcript, p. 91.

This suit was not instituted until June 24, 1895. (Transcript, pp. 1, 12.) While Chapter 114 of the Acts of Tennessee of 1895, repealing Chapter 2 of the Acts of 1891, as above stated, was passed April 27, 1895, approved May 6, 1895, and took effect "from and after its passage, the public welfare requiring it."

Acts of Tennessee, 1895, Ch. 114, pp. 180, 185.

Hence, before the institution of this suit, appellee had complied with the only laws of Tennessee applicable to business transacted by it prior to 1895, and which were still in force and effect when this suit was instituted.

While we insist, and think we have demonstrated, that appellee never in fact did any business in Tennessee to which any of the acts in question were applicable, yet, even if it should be held that it was

in fact doing business in Tennessee, it appears that before the institution of this suit, it had fully complied with the only Tennessee laws then in force regulating the transaction of business by it in Tennessee, and we submit that having complied with such laws in 1893, it was entitled in 1895 to institute a suit for the enforcement of the contract with appellant Bedford, which had its inception, as has been already shown, before the passage by the Tennessee Legislature of either Chapter 95 or Chapters 2 and 122 of the Tennessee Laws of 1891. (For these laws in full, see Addenda to Appellants' Brief, pp. 74-81.)

On this state of the record, the United States Circuit Court for the Western District of Tennessee, after a full review of all the questions involved, reached the conclusions, *first*, that the notes in question were to be construed and enforced under the laws of New York as New York contracts, and, *second*, that even if the contract relations between appellants and appellee were to be governed by the laws of Tennessee, they would, nevertheless, be binding and enforcible as against the appellants in the Federal courts in Tennessee.

Opinion of Hammond, *J.*, *ante* pp. 26-45.

Passing upon the effect of the filing of the charter of appellee and the abstract thereof in 1893, Judge Hammond says: "It is sufficient to refer to the case of *Cæsar* v. *Cappell*, 83 Fed. Rep., 403, as to the judgment of the Court upon the effect of the filing of the charter with the Secretary of State and the abstract thereof upon August 11, 1893, subsequently to the making of the contract and prior to the passage of the Curative Act of May 10, 1895. We there held that a compliance with the statute prior to the Act of 1895 was in itself a sufficient filing which removed whatever infirmity there was in the contract, and, therefore, it might be enforced by the Courts

without regard to the Act of 1895 subsequently passed."

Ante pp. 44, 45, fols. 132, 133.
Cæsar *v.* Cappell, 83 Fed. Rep., 403.
See also Neuchatel, &c., Co., *v.* The Mayor, 155 N. Y., 373, 376.

The doctrine of *Cæsar* v. *Cappell*, as to the place of contract, has been expressly approved by the Supreme Court of Tennessee, which, in a case almost identical with the case at bar, held that "a contract for the loan of money by a building and loan association, having no office or agency in this State, made direct from its home office in Louisiana, to be secured by a mortgage on land in Tennessee, the loan and each installment note thereon being payable in the former State, is a Louisiana contract, and the Tennessee statutes requiring foreign corporations to register their charters as a condition of doing business or holding property in the State does not apply."

Neal *v.* New Orleans, &c., Assn., 100 Tenn., 607, 614, 615.

In a similar case decided by the Chancery Court of Appeals of Tennessee and affirmed orally by the Supreme Court of that State on March 2, 1898, it appeared that the trust company, a corporation of Pennsylvania, had no "regular" agent in Tennessee, but loaned money to Tennesseans on applications sent to it by loan brokers in Tennessee "who were the agents of the borrowers." The notes were always payable at Philadelphia. A great many loans were made in this way. A borrower attempting to evade liability on the ground that the corporation had not complied with the Acts of 1891, the Court held that such contracts were not within those acts, since they were payable in another State; and the contracts were enforced. This was done, although the parties had stipulated in the contract that "parties making and receiving the

loan and making the mortgage, contract with reference to the laws of Tennessee."

Norton *v.* Union Bank & Trust Co., 46 S. W. Rep., 544.

The case of *Association* v. *Farrell*, decided by the Supreme Court of Tennessee, but in which no written opinion was delivered, is stated in full in the case of *Norton* v. *Union Bank & Trust Co.* just cited, and that case seems to have been upon all fours with the case at bar. There "the building association had several agencies in this State, and as a matter of fact had a local agency established at Clinton, in Anderson County, Tennessee, where the defendant Farrell resided, and Farrell was a subscriber to the stock of the association through this local agent. Farrell corresponded with the association about a loan for about $5,000. He afterwards went to Louisville, Ky., the office of the association, and according to the opinion of the Supreme Court, there secured the loan for himself. He got $,500 in money, came home, executed a mortgage and sent it to Louisville and got the balance of the money. The note and mortgage were both executed in Tennessee, but the note was made payable in Kentucky. * * * Our Supreme Court held that this was a Kentucky contract, and that it was not doing business within the prohibition of our statute" (46 S. W. Rep., 546).

The case of *Bank* v. *Massengill*, another unreported decision of the Supreme Court of Tennessee, is also reviewed, and stated in the opinion of the Chancery Court of Appeals in the *Norton* case, which opinion, as already stated, was affirmed by the Supreme Court of Tennessee.

Norton Case, 46 S. W. Rep., 546.

The Tennessee case relied on by appellants to negative the foregoing cases is that of *United States Savings Co.* v. *Miller*, 47 S. W. Rep., 17. This was a decision of the Chancery Court of Appeals which was affirmed orally by the Supreme Court on De-

cember 18, 1897. It therefore antedated, by some months, the decision of the same court in *Neal* v. *New Orleans Association*, 100 Tenn., 607, and of *Norton* v. *Trust Co.*, 46 S. W. Rep., 545, both of which cases were determined in the Supreme Court of Tennessee in March, 1898.

While the opinion of the Chancery Court of Appeals in the Miller case contains many dicta that may well be regarded as tending to sustain the contentions of appellants, yet, in view of the subsequent decision of the Supreme Court of Tennessee in the *Neal* case, we do not think that the mere affirmance of the *Miller* case by the Supreme Court should be regarded as an adoption of all of the doctrines stated in the opinion of the Chancery Court of Appeals determining the case below. The point actually decided in the *Miller* case was that the contract in controversy was a Minnesota contract, *because "there was no legal delivery of the bond and mortgage until they reached Minnesota and were approved there"*; and it was further held that the complainant corporation in that case *had sufficiently complied with the foreign corporation laws of Tennessee*, so that its contracts, though made by it in Tennessee while doing business in that State, could be upheld. All else, in the opinion of the Chancery Court of Appeals, must be regarded as the mere "dicta" of the Judge delivering the opinion, and, consequently, the affirmance of that case by the Supreme Court, the case being decided *in favor of the corporation*, and the corporate contract being enforced, cannot be regarded as an acceptance by the Supreme Court of Tennessee of the "dicta" of the learned Judge who delivered the opinion in the Chancery Court of Appeals.

U. S. Savings and Loan Co. *v.* Miller, 47 S. W. Rep., 17, 22-25.

In the *Miller* Case, the effect of the repealing Act of 1895, *supra*, and Chapter 122 of the Acts of 1891, is reviewed, and the Court says: "Having arrived

at this point we next determine that § 1, C. 81, Acts of 1895, supersedes § 2, C. 122 of the Acts of 1891, and that it is not now necessary that any foreign corporation desiring to do business in this State should cause to be registered an abstract of its charter in each of the counties where it desires to do business or to own property, but that it is sufficient that such foreign corporation should file in the office of the Secretary of State a copy of its charter, and that it is 'sufficient to authenticate such copies so filed by the certificate of the secretary or secretaries of such corporations, and by attaching thereto the corporate seal,' this latter clause of § 1, C. 81, Acts 1895, repealing by implication the former provisions upon that subject contained in § 2, C. 31, Acts 1877, above referred to."

And further on in the opinion reference is made to a still later Act of Tennessee, to wit, Chapter 25 of the Acts of 1897: "This Act amends C. 119, Acts 1895. This last mentioned Act provided, in substance, that where foreign corporations doing business in this State have made contracts or purchased property without filing a copy of their charter in the office of the Secretary of State, or without filing an abstract of the same in the Register's office of the counties where they did business, nevertheless such contracts or purchases should be valid, if at the date of the Act such corporation had already complied with the law, or should do so within four months from the passage of that Act. The Act of 1897 (Chapter 25) amended this Act by applying its saving provisions to 'such foreign corporations as in good faith shall before September 9, 1895, have complied with the provisions of Chapter 122 of Acts of 1891, as modified and amended by the provisions of Chapter 81 of Acts of 1895'; that is, to such foreign corporations as had filed a copy of their charter in the office of the Secretary of State. This Act was passed on March 24, 1897. Its purpose was to validate the contracts of such foreign corporations as on September 9, 1895, stood in the

attitude of having complied with Acts 1895, C. 81. On that day, September 9, 1895, the complainant company did stand in that attitude. It then had on file with the Secretary of State a copy of its charter. True, that charter, or copy thereof, was filed in the office of the Secretary of State in 1891, prior to the passage of Acts 1895, C. 81; but that statute was a remedial one, and should be liberally construed; and as the complainant company, at the time that Act was passed, stood in the position contemplated by that Act, it fell, as to contracts thereafter made, clearly within the equity of the statute. It would have been a mere idle form to again file with the Secretary of State a paper already on file with him."

U. S. Savings & Loan Co. *v.* Miller, 47 S. W. Rep., 24, 25.

Now, in view of the fact that Chapter 114 of Acts of 1895, as we have pointed out above, repeals Chapter 2 of the Acts of 1891, passed March 26 1891, and approved March 28, 1891, entitled "An Act to regulate the business of building and loan associations," and Chapter 114 of the Acts of 1893, entitled "An Act to amend Chapter 2 of the Acts of 1891," it is manifest, under the reasoning of the Tennessee Chancery Court of Appeals in the *Miller* case, that by the filing of its charter in August, 1893, appellee complied with the only foreign corporation laws of Tennessee in force at the time of the institution of this suit and necessary to validate its contracts, even if they be treated as contracts made in the State of Tennessee. Hence, appellants' contentions in this case must not only fail because the contracts in question are contracts of the State of New York, but also because, even if contracts of the State of Tennessee, they are valid and enforcible in the Courts of that State.

Neuchatel, &c., Co. *v.* The Mayor, 155 N. Y., 373, 376; overruling the same case, 9 Misc. (N. Y.), cited upon Appellant's Brief.

It is true, that in a Tennessee case earlier than any of the cases heretofore reviewed, the Supreme Court of Tennessee held that it would refuse to enforce a mortgage held by a non complying foreign corporation, but it does not appear from the opinion of the Court where the notes were payable and no point was made in the case that the notes being payable in another State than Tennessee their validity was to be determined by the law of the place of payment. Counsel for the corporation in the *Cannon* case seems to have rested his entire argument on the point that as the borrower had become a stockholder prior to the passage of the Act of 1891, that act could not destroy his vested right to an "advance" nor the right of the corporation to make such "advance" to him. In short, the contention in that case was that the Act of 1891 was unconstitutional, as impairing the obligation of a contract. We understand that in fact the notes in that case were payable in New York, but as the point is not adverted to in the opinion of the Court, the fair presumption is that the Court's attention was not called to the point, and therefore, the *Cannon* case is not an authority in support of the contentions of appellants here; but, so repulsive to their sense of justice was the conclusion that the Judges of the Supreme Court of Tennessee reached in the *Cannon* case, that they eagerly availed themselves of an equity maxim to compel the borrower to repay the amount received by him under the contract which they held invalid.

New York, &c., Building Assn. *v.* Cannon, 99 Tenn., 344, 349, 350.

The doctrines here contended for by the appellee are sustained by recent decisions in the Federal courts.

Sullivan *v.* Sheehan, 89 Fed. Rep., 247.
Lauter *v.* Jarvis-Conklin Mortgage Co., 85 Fed. Rep., 894.

And the Federal courts not being concluded by previous decisions in the State courts construing the statutes in question, are free, in this case, to hold that even if the statutes were not complied with by the appellee, and even if its contracts were Tennessee contracts, yet, nevertheless such contracts are not rendered absolutely void and unenforcible, but, the statutes providing a penalty, that such penalty must be treated as the only punishment that can be inflicted upon appellee for non-compliance with the statutory requirements.

Union Gold Min. Co. *v.* Bank, 96 U. S., 640.

National Bank *v.* Whitney, 103 U. S., 99, 103.

Fritts *v.* Palmer, 132 U. S., 282.

Harris *v.* Runnels, 12 How., 79.

Crefield Mills *v.* Goddard, 69 Fed. Rep., 141; 75 Fed Rep., 818.

Jarvis, &c., Co. *v.* Wilhoit (Tenn.), 84 Fed. Rep., 514.

Union Mut. Life Ins. Co. *v.* McMillen, 24 Ohio St., 67.

Charter Oak Life Ins. Co. *v.* Sawyer, 44 Wis., 387.

2 Morawetz on Corp. (2d Ed.), § 665.

In one Tennessee case, the agent, in Tennessee, of a foreign corporation which had not complied with the Act of '91, was indicted in the criminal court for embezzling money of his principal collected in the course of the "unlawful" business of the corporation within the State. He set up the fact that the corporation, his principal, had not complied with the Acts of '91, as a defense to the indictment. But the Court repudiated any such doctrine, citing an opinion of Mr. Justice Brewer, then a member of the Kansas Supreme Court

State *v.* O'Brien, 94 Tenn., 82.

State *v.* Spalding, 24 Kansas, 1.

The only conclusion at which one can arrive, after an examination of the Tennessee cases, that will harmonize them all is that the Act of '91 was intended to apply only to such foreign corporations as conducted an established business in the State, had an office and place of business and all the machinery for the transaction of its business there.

Thus, in the first case on the subject, it appeared that the corporation, a lumber company, had its lumber yards in Tennessee and conducted a large business there. What business was done was begun and concluded there.

Lumber Co. *v.* Thomas, 92 Tenn., 587.
Milan Co. *v.* Gorton, 93 Tenn., 597.

The Act does not apply to contracts which are merely the winding up of transactions begun before its passage; nor to contracts made or performable in another State; nor to contracts of foreign corporations having no office in the State (appellee had none in Tennessee) and transacting business entirely through soliciting agents and by correspondence, all contracts being closed at the corporate *situs* and not in Tennessee.

Asher *v.* Texas, 128 U. S., 129.
McCall *v.* California, 136 U. S., 104, 110.

We do not, of course, concede on the facts of this case any obligation resting upon appellee to comply with such statutes, or any violation of the statutory provisions by the transactions between appellants and appellee as disclosed by this record. We insist that the contract was a New York contract.

VII.

The second question certified to this Court by the Circuit Court of Appeals is as follows:

"WAS THE VALIDITY OF THE MORTGAGE EXECUTED AND DELIVERED UNDER THE SAME CIRCUMSTANCES TO BE DETERMINED BY THE VALIDITY OF THE NOTES TO WHICH IT WAS INCIDENT, OR BY THE LAW OF THE STATE WHERE THE LAND LAY WHICH THE MORTGATE CONVEYED AND WHICH UPON DEFAULT MUST BE SOLD TO PAY THE NOTES?"

The validity of the mortgage must be determined by that of the notes to which it is incident. We submit this as the correct answer to the second of the questions certified by the Circuit Court of Appeals.

The contention of appellants is, that "if it should be conceded, however, that the notes were valid, still the mortgage is invalid. The mortgage was executed in Tennessee, conveys Tennessee land, and necessarily has to be enforced in Tennessee. If the contract evidenced by the notes be valid, it is upon the theory that they are New York contracts, either because they are payable in New York, or because the notes were accepted by the association in New York. Any liability on the notes is based on the idea that they are beyond the jurisdiction of the State of Tennessee and may not be affected by its laws. Now, the land which is embraced in the mortgage is situated in Tennessee and cannot be withdrawn therefrom either actually or theoretically. The validity of all conveyances of said land is necessarily tested by the laws of the State of Tennessee. This is true whether the mortgagor executes the mortgage in Tennessee

or outside of it. The validity of a contract as to land must be determined by the law of the place where the lands are situated."

Appellants' Brief, pp. 45, 46.

We take issue upon the proposition of law thus stated by appellants' counsel, and, assuming that the notes secured by the mortgage are valid contracts entered into in New York and governed by the laws of that State, we insist that the mortgage securing the notes, no matter where executed, is but an incident to the New York contract, is itself a part of that contract, and, upon constitutional as well as general legal grounds, must be enforced as against the appellants.

Allgeyer *v.* Louisiana, 165 U. S., 578.
St. Louis, &c., R. Co. *v.* Terre Haute Rd., 145 U. S., 393, 405.
Sullivan *v.* Sheehan, 89 Fed. Rep., 247.
West Mass. Fire Ins. Co. *v.* Hilton, 42 App. Div. (N. Y.), 52, 58, 61.

To hold otherwise would be to so construe the statutes of Tennessee against the enforcement of contracts made by foreign corporations with citizens of Tennessee, as to deny all remedy upon such contracts even though valid in the State of performance. Such a denial of remedies is unconstitutional.

Louisiana *v.* New Orleans, 102 U. S., 203, 206, 207.
Edwards *v.* Kearzey, 96 U. S., 595, 603.
Greenwood *v.* Freight Co., 105 U. S, 13.
The Homestead Cases, 12 Am. Rep., 507, 515; s. c., 22 Gratt. (Va.), 266.

Undoubtedly the rule is, that questions affecting the descent, alienation or transfer of real estate must be determined by the *lex loci rei sitæ*. That law must determine what formalities are necessary, the

requisites of execution, acknowledgment, delivery and registration. There is no claim here that the mortgage in form and execution is not in strict compliance with the local laws of Tennessee. The only claim of appellants is that the mortgage is void and unenforcible in Tennessee because given to secure the payment of obligations which they insist were entered into in violation of the laws of Tennessee, and which they say are therefore void.

A conveyance of land is one thing, and a mere pledge of it to secure a debt is another and entirely different thing. This Court has well stated the nature of a mortgage and defined its legal effect: "The property in no sense belonged to the non-resident bondholder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was, both at law and in equity, a mere security for the debt. * * * A mortgage being thus a mere chose in action, it only confers on the holder or party for whose benefit the mortgage was given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides."

Case of the State Tax on Bonds, 15 Wall., 300, 322, 323.

And such is the rule in Tennessee: "The mortgagee's interest in the mortgaged land is only a security for the debt, the debt being the principal and the land only an incident, and therefore a sale of the mortgagee's interest in the mortgaged land, under a bill to which the mortgagor was not a party, conveys no title to the purchaser."

McGan *v.* Marshal, 7 Hum. (Tenn.), 122.

In recognition of this rule there are many cases holding that the mortgagor is not liable to account

for rent of the mortgaged premises. Such rents belong to him until foreclosure.

Whitmore *v.* Parks, 3 Hum. (Tenn.), 95.
McCall *v.* Cawthorne, 9 Bax., 61.
Young *v.* Hale, 6 Lea, 182.

Under the Tennessee Statute of Frauds, a writing is required for a transfer of an interest in land, yet, it is held that no writing is necessary for the transfer of a mortgage.

McCallum *v.* Jobe, 9 Bax., 174.

The mortgage passes as a mere incident to the transfer of the notes secured by the mortgage without any special agreement whatever.

Under these authorities then, the appellee, by taking a mortgage on Tennessee land, did not acquire any real property there, and no occasion arises for the application of the *lex loci rei sitæ*. It acquired a mere chose in action, which neither had or could have any *situs* apart from the person of its owner or "any locality independent of the party in whom it resides." It would seem to follow beyond question that the validity of this chose in action must be determined by that of the note to which it was an incident.

"The note which is the basis of this suit was made in Iowa and the contract must be governed by the laws of Iowa."

McCall *v.* Palmer, 116 U. S., 98, 100.

"The legal fulfillment of a contract of loan on the part of the borrower is repayment of the money, and the security given is but the means of securing what he has contracted for, which, in the eye of the law, is to pay where he borrows unless another place of payment be expressly designated by the contract.

Coghlan *v.* South Carolina R. R. Co., 142 U. S., 101, 110.

DeWolf *v.* Johnson, 10 Wh., 367, 383.
Hall *v.* Cordell, 142 U. S., 116, 120.
Mutual Life Ins. Co. *v.* Dingley (C. C. A.), 100 Fed. Rep., 408, 413.

So, in a case involving the construction of these Tennessee statutes by the United States Circuit Court of Appeals for the Sixth Circuit, Lurton, Circuit Judge, who was formerly Chief Justice of the Supreme Court of Tennessee, and who is familiar with the law in that State upon this subject, laid down the rule that "the mortgage to secure this note was a mere security and followed the debt."

Lauter *v.* Jarvis-Conklin Mortgage Trust Co., 85 Fed. Rep. (C. C. A.), 894, 896.

And the same doctrine has been enunciated in other Circuits.

Sullivan *v.* Sheehan, 89 Fed. Rep., 247.
Andruss *v.* People's Building, Loan, &c., Assn. (C. C. A.), 94 Fed. Rep., 575, 580.

Judge Story and Chancellor Kent both reach the conclusion that the locality of real estate has nothing to do with the validity of a note or mortgage upon the ground that the security is merely an incident to the note.

Story on Conflict of Laws (8th ed.), § 287*a*.
Kent, Chancellor, in Van Schaik *v.* Edwards, 2 Johnson's Cases, 366–368.

So, in a recent Tennessee case involving a building and loan association contract, a note was given to complainant, a foreign corporation, secured by a trust deed on Tennessee land. In default of payment, complainant had the trustee sell, and became the purchaser. Defendant re-

fusing to vacate the premises, an action of ejectment was brought against him. The defense was, that the trust deed was usurious on its face, as indeed it was under the Tennessee law. The Supreme Court of Tennessee, however, held that as the notes secured by the deed of trust were payable in Minnesota, they were Minnesota contracts, and, being valid there, were valid everywhere. Complainant was given judgment in the ejectment suit; the Court thereby again indicated that the validity of the trust deed was to be determined by that of the note to which it was an incident.

Pioneer Association *v.* Cannon, 96 Tenn., 599.

Assuming the notes to be valid because payable in New York, there can be no doubt that under numerous decisions of the Supreme Court of Tennessee, the mortgage given to secure such notes is valid and enforcible.

Neal *v.* Building and Loan Assn., 100 Tenn., 607.

Norton *v.* Trust Co., 46 S. W. Rep., 544.

Hubble *v.* Morristown, 95 Tenn., 585.

On the other hand, if the notes to secure which the mortgage was given are invalid and not enforcible, then, no matter how valid the mortgage may be, it cannot be enforced if the notes to which it is an incident are unenforcible.

Am., &c., Mortgage Co. *v.* Jefferson, 69 Miss., 770; S. C., 30 Am. St. Rep., 587.

Armistead *v.* Blythe (Miss.), 20 So. Rep., 298.

Hence, it follows that if the notes in this case are to be governed by the law of the place of payment, namely, the law of New York, then both notes and

mortgage are valid and enforcible, and the courts of Tennessee, both State and Federal, will enforce the mortgage security as being but an incident to the commercial obligation which the notes represent. Any other conclusion would involve the palpable inconsistency of holding the notes valid and the mortgage invalid, a result which has never been reached by any court in any jurisdiction, formalities in the execution of the papers not being involved.

Finally, as controlling upon both the first and second questions certified by the Circuit Court of Appeals, we submit that the Federal courts not being bound by State court decisions, construing the Acts of 1891 at the time the contracts between appellants and appellee were entered into, are at perfect liberty to adopt their own construction of those acts, and we contend that the true construction of those acts is, that as they merely impose penalties for non-compliance, the only liability of appellee, if any violation of the statutes is shown, is to pay the penalty provided by the State statutes in question, and its contracts are not void.

Eastern B. & L. Ass'n *v.* Snyder (Va.), Appendix "B," *post*, p. 153.
Fritts *v.* Palmer, 132 U. S., 282, 288, 289, 291, 292.
National Bank *v.* Matthews, 98 U. S., 621, 627.
National Bank *v.* Whitney, 103 U. S., 99, 103.
Swope *v.* Leffingwell, 105 U. S., 3.
Reynolds *v.* Crawfordsville Bank, 112 U. S., 405, 412.

We do not deem it necessary to review the authorities cited in appellants' brief in support of their contention that the validity of the mortgage in this case as security for the notes payable in New York, is to be determined, even though the validity of the notes be admitted, by the *lex loci rei sitæ* instead of by the *lex loci contractus*. Suffice it to say that all

the cases upon which they rely are cases involving questions of purely local law as to the nature, validity and execution of instruments conveying the title to real estate. A recent conspicuous example of cases of this nature is afforded by the case of *DeVaughn* v. *Hutchinson*, 165 U. S., 566. In that case this Court held that the meaning, application and effect of the rule in Shelley's case must be determined by the law of the State where the land lay, because it was a rule of property, but, when there is no question of this character involved and the inquiry is merely whether a pledge of land by mortgage is valid, notwithstanding a State statute prohibiting the mortgagee, a foreign corporation, from "doing business" in the State, the rule should be, as we contend, that the validity of the mortgage must be tested by the validity of the notes, and if they are valid and enforcible, the mortgage securing them is likewise valid.

VIII.

The third question certified to this Court by the Circuit Court of Appeals is as follows:

"MAY A STATE BY ITS LAWS FORBIDDING THE TRANSACTION OF BUSINESS WITHIN ITS BORDERS, ANNUL THE CONTRACTS OF ITS CITIZENS, ENTERED INTO AND TO BE PERFORMED WITHOUT THE STATE, WHEN THOSE CONTRACTS ARE BUT THE CONSUMMATION OF THE INHIBITED BUSINESS WITHIN THE STATE, WITHOUT AN INFRACTION OF THE XIVTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES."

Appellants contend that the United States Circuit Court of Appeals in this question did not mean "to intimate that the contracts in question were technically 'entered into' in New York," and they add, "we also, in this connection, again, insist that even if the contracts were technically closed in New York,

that they were made in the course of, and as a part of, a general business admittedly carried on by the Eastern Building and Loan Association in Tennessee, which business was forbidden by Tennessee law. This illegal business cannot be made practically legal by having all the contracts made therein closed outside of the State of Tennessee. To so hold, seems to us to sanction a plain evasion of the Tennessee laws. By such a decision, all laws attempting to control foreign corporations are practically destroyed."

Appellants' Brief, p. 49.

Our answer to the third question certified and to the foregoing contention of appellants' counsel is, that the Tennessee statutes must be held unconstitutional if it is necessary to construe them as by their terms invalidating contracts made in New York and to be performed in that State.

The question certified by the Circuit Court of Appeals assumes as a premise that these contracts were both made and to be performed in New York, and we shall discuss the question here on the assumption that this premise is correct and that we have demonstrated it to be so upon the facts shown by the record in this case.

Ante, pp. 56–66; 96–99, fols. 170–198.

The question is not whether the State of Tennessee may close the doors of its courts to corporations violating its laws, or whether the State may refuse to allow the process of its courts to be used in aid of contracts made in violation of its laws.

This it clearly may do in proper cases.

Tioga R. *v.* Blossburg, &c., R. Co., 20 Wall, 137.

Story *v.* Ills. Cent. R. Co., 116 U. S., 347.

Doyle *v.* Ins. Co., 94 U. S., 535.

But doubtless the State of Tennessee must observe those rules of constitutional obligation which require it to give full faith and credit to the laws and judi-

cial proceedings of its sister States and to pass no laws impairing the obligation of contracts.

Const. U. S., Art. IV., § 1.

New York, L. E., &c., R. Co. *v.* Pennsylvania, 153 U. S., 628.

Nor can it deny to any person within its jurisdiction "due process of law" and the equal protection of the laws. Upon this question we have already sufficiently collected the authorities.

Ante, pp. 91–94.

But this case was instituted in the Circuit Court of the United States by a bill in equity, and, consequently, no question as to the authority of the Legislature of Tennessee to close the doors of its courts to appellee is involved.

Sullivan *v.* Beck, 79 Fed. Rep., 200.

The question is whether the power of the State of Tennessee with reference to foreign corporations extends so far as to authorize or empower it to annul by legislative action the contracts of such corporations, made and performable beyond its borders. It is a question as to whether the State of Tennessee may say that neither a Federal court nor, indeed, a New York court shall enforce the performance of a contract made in New York and performable there, merely because the obligor in such contract is a citizen of Tennessee. To state the question is to answer it. The assumption that the contract was both entered into and to be performed in New York compels the conclusion that the corporation, in completing such contract by its acceptance thereof in New York, was not acting in that instance within the territorial jurisdiction of Tennessee, nor within its legislative control. It makes no difference how many times appellee may have violated the laws of Tennessee by entering into contracts within that State in violation of its statutes, provided it did not violate them in that respect in this instance.

Norton *v.* Trust Co., 46 S. W. Rep., 546.

The reason and the purpose of the Tennessee Act of March 26 and 28, 1891, Chapter 2, are not apparent upon the face of the act.

Appellants' Brief, Appendix, pp. 76-81.

This act, which was the only act with which appellee had not complied at the time of the institution of this suit, was, as we have already pointed out, itself repealed by the Legislature of Tennessee prior to the beginning of this suit.

Acts of Tennessee, 1895, Ch. 114.
Ante, pp. 110, 111; 115-117.

The true object and purpose of the act in question, as suggested by Judge Hammond, seems to have been to secure fees for State officers. It was an act "for revenue only," and the responsibility for its existence lay in the fact that Tennessee officers were then paid in fees. There is nothing in the character or purpose of the act which makes it a proper exercise of the "police power" of the State.

Bedford Case, 88 Fed. Rep., 11; *ante*, p. 29, fol. 85.

We have already conceded the rule to be that a State corporation not engaged in interstate commerce cannot carry on or "do business" in a State other than that of its corporate *situs*, except by the consent of such other State, either expressly given or implied upon principles of interstate comity.

Ante, p. 80.
Hooper *v.* California, 155 U. S., 648, 652.
Waters-Pierce Oil Co. *v.* Texas, 177 U. S., 28, 46.

In view of this concession, it is unnecessary to review the numerous authorities which appellants' counsel cite upon their brief to support it. But the proposition submitted by the Circuit Court of Appeals in the third question certified is different from this, and involves only the right of a State, by its legislation, to "annul the contracts of its citizens entered into and to be performed without the State," merely because those contracts are but the consum-

mation of business forbidden to be transacted in the State by the foreign corporation with which its citizens contract in the State of the corporate *situs*.

Our insistence is that such legislation as this is necessarily in contravention of the XIVth Amendment to the Constitution of the United States.

We have already argued at length the proposition that the transactions between appellants and appellee constituted interstate commerce and are beyond the reach of State regulation or prohibition.

Ante, pp. 84-91.

Apart from that question, we insist that the Tennessee statutes, if given the construction for which appellants contend, would interfere with that liberty of contract which the XIVth Amendment to the Constitution of the United States guarantees, and that the effect of the statutes at the same time would be not only to impair the obligation of a contract, but to deprive the appellee of "due process of law" by preventing it from enforcing in the courts of the United States in Tennessee, a contract made in New York, outside the jurisdiction of Tennessee, and as a mere incident to which mortgage security upon Tennessee property was given. That statutes having such consequences as these are invalid and unconstitutional, seems to be settled law.

Allgeyer *v.* Louisiana, 165 U. S., 578, 586, 588, 589.

Powell *v.* Pennsylvania, 127 U. S., 678, 684.

New York, L. E., &c., R. Co. *v.* Pennsylvania, 153 U. S., 628.

The power of a State to regulate the contracts of foreign corporations or the contracts between its citizens and foreign corporations "does not and cannot extend to prohibiting the citizens from making contracts of the nature involved in this case outside of the limits or jurisdiction of the State, and which are also to be performed outside of such jurisdiction; nor can the State legally prohibit its citizens from

doing such an act as writing this letter of notification, even though the property which is the subject of insurance may at the same time when such insurance attaches be within the limits of the State. The mere fact that a citizen may be within the limits of a particular State does not prevent his making a contract outside its limits while he himself remains within it."

Allgeyer *v.* Louisiana, 165 U. S., 578, 591, 592.
Tilden *v.* Blair, 21 Wall., 241.
Milliken *v.* Pratt, 125 Mass., 374.

The contract in this case was thus made. It was a valid contract made outside of the State, to be performed outside of the State, although the property, the mortgage upon which was given as security for the payment of the notes in New York, was within the State of Tennessee. As the contract was valid in the place where made and where it was to be performed, no State legislation can be permitted to impair its obligation or prevent its enforcement.

Allgeyer *v.* Louisiana, 165 U. S., 592.

The XIVth Amendment to the Constitution of the United States "undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; and that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; *that they should have like access to the courts of the country for the protection of their persons and property, the prevention of wrongs and the enforcement of contracts.*"

Yick Wo *v.* Hopkins, 118 U. S., 356, 367.
Santa Clara Co. *v.* South. Pac. R. R., 118 U. S., 394, 396.

In other connections, we have already reviewed the authorities in support of the answer which we think should be made by this Court to the third question submitted for determination by the Circuit Court of Appeals, and to that discussion and to those authorities we refer.

Ante, pp. 91–95.

We have no doubt that the *Allgeyer* case is a controlling authority upon this question, because the facts of this case and the premises assumed in the question certified and which we are now considering, brings this case directly within the principle of the decision in the *Allgeyer* case.

Ante, pp. 92, 93.

Most, if not all, of the cases cited and relied upon in appellants' brief upon the question now the subject of discussion are inapplicable, because they do not involve the proposition that the contracts were "entered into and to be performed *without the State*" and were valid and legal contracts in the State where they were entered into and were to be performed.

IX.

The fourth question certified to this Court by the Circuit Court of Appeals is as follows:

"EVEN IF A STATE MAY BY LAW REFUSE ENFORCEMENT OF SUCH A CONTRACT IN ITS COURTS, SHOULD A CIRCUIT COURT OF THE UNITED STATES SITTING IN THE STATE REFUSE TO ENFORCE IT WHEN JURISDICTION OVER THE PARTIES EXISTS BY REASON OF THEIR DIVERSE CITIZENSHIP?"

In discussing this question, appellants in their brief say: "The courts, of course, have nothing to do with the policy of the laws of Tennessee in ques-

tion," and their insistence is, that "it is perfectly well settled that any State has the right to exclude any foreign corporation from transacting business within its limits, and that any terms can be imposed upon a foreign corporation seeking to do business within the State that the State sees fit to impose."

Appellants' Brief, p. 56.

This is a mere begging of the fourth question certified by the Circuit Court of Appeals That question presents to this Court for its determination the proposition whether if a State by its laws forbidding the transaction of business within its borders, annuls the contracts of its citizens entered into and to be performed without the State, the courts of the United States are open to secure the enforcement of such a contract when jurisdiction exists by reason of the diverse citizenship of the parties.

The answer to this question, both upon principle and authority seems to be very clear. Under the Constitution of the United States the courts of the United States are open to suitors having the requisite diversity of citizenship, when the requisite amount in controversy appears, and no State statutes can limit, hinder or control the exercise of this jurisdiction.

Arrowsmith *v.* Gleason, 129 U. S., 86, 99.

Smyth *v.* Ames, 169 U. S., 466, 516, 517.

Clark *v.* Bever, 139 U. S., 96, 102, 103.

Sullivan *v.* Beck, 79 Fed. Rep., 200.

So far as the contention of appellants' counsel that the courts of the United States are bound in this case to follow the construction of the State statutes, adopted by the State courts, is concerned, it is only necessary to repeat that the question involved is one in which, under the circumstances, the Federal courts will adopt their own views without being concluded by the decisions of the State courts.

The contracts here in question were either made before, or, as to part of them, just after the passage of the Acts of 1891, but long before the Supreme Court of that State had announced its construction of those acts. The acts were passed in March, 1891. The notes and mortgage were executed within three months thereafter, while the first decision of the Supreme Court of Tennessee, construing the statutes, was rendered May 20, 1893. (Lumber Co. *v.* Thomas, 92 Tenn., 587.) In such cases it has always been the rule that a Federal court, while giving much weight to the opinions of the State court, will still determine for itself the true construction of statutes applicable to contracts which were entered into before the State court construction was promulgated.

Burgess *v.* Seligman, 107 U. S., 20.

Anderson *v.* Santa Anna Township, 116 U. S., 356.

Trust Co. *v.* Cincinnati (C. C. A.), 76 Fed. Rep., 296.

Speer *v.* Byrd (C. C. A.), 88 Fed. Rep., 789.

In a recent case involving the Virginia coupon question, this Court held that (quoting the language of Mr. Justice Wayne in *Bank* v. *Skelly*, 1 Bl, 443): "It has never been denied, nor is it now, that the Supreme Court of the United States has an appellate power to revise the judgment of the Supreme Court of a State whenever such a court shall adjudge that not to be a contract which has been alleged in the forms of legal proceedings by a litigant to be one within the meaning of that clause of the Constitution of the United States which inhibits the States from passing any law impairing the obligation of contracts. * * * It never was intended, and cannot be sustained by any course of reasoning, that this Court should or could, with any fidelity to the Constitution of the United States, follow the construction of the Supreme Court of a State in such a matter when it entertained a different opinion."

McCullough *v.* Virginia, 172 U. S., 109.

The decision of the Tennessee Supreme Court in 1893, if given the effect appellants claim for it, will operate to impair the obligation of contracts made long before. The decision accomplishes this by a forced construction of a statute passed about the time these contracts were made. And we now insist that the statute did not operate to destroy or invalidate these contracts, but that the erroneous construction of the statute does so operate.

Under this condition of affairs, it seems the rule announced in the Virginia coupon case, quoted *supra*, should apply.

Assuming that a Circuit Court of the United States, sitting in Tennessee, should be of the opinion that the construction placed on these statutes by the State Supreme Court was erroneous, and that these acts did not invalidate contracts made by a foreign corporation which had not complied with them, it cannot be doubted that such a court, having jurisdiction by virtue of the diverse citizenship of the parties, would have the power to uphold and enforce such contracts.

The position taken by the learned Judge who first tried this case, that the Federal courts will enforce such contracts, notwithstanding the ruling of the State court, is supported by two Federal cases.

Sullivan *v.* Beck, 79 Fed. Rep., 201.

Farmers' L. & T. Co. *v.* Railroad, 68 *Ibid.*, 417.

In this latter case, which was a proceeding by a trust company to enforce a trust, the claim was made that the trust company had not complied with the statute for the protection of the *cestuis que trustent*, the Court said: "It may be that the Courts of the State of Illinois would refuse to recognize the trustee standing in defiance of its laws I do not think, however, that the duty is imposed upon Federal courts to punish innocent parties in vindication of the authority of the State."

X.

APPELLANTS ARE ESTOPPED TO CONTEST THE VALIDITY OF THESE NOTES AND THE MORTGAGE GIVEN TO SECURE THEIR PAYMENT, FOR THE FOLLOWING REASONS:

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1. It was their voluntary act, their insisting upon a contractual right, that brought about this loan. Without dwelling at length upon this point, we say that the dealings with appellants were at the outset valid. Upon the passage of the Act of 1891 the power of appellee to go further was, so appellants contend, at an end, but appellants insisted upon a completion of the transaction, and such completion necessitated the notes and mortgage. Their action in thus insisting upon the carrying out of the whole contract estops them from denying the validity of the latter part of it. Here is a series of interdependent agreements. Appellants cannot select such portions as confer a benefit on them and at the same time repudiate the remaining portions which constitute the consideration due from them.

2. Having received and used appellee's money with full knowledge (implied if not actual) of appellee's alleged incapacity to contract in Tennessee, appellants are estopped to set up that incapacity as a defense here.

State *v.* O'Brien, 94 Tenn., 82.

Where a party deals with a corporation with implied knowledge of its incapacity to contract he is estopped when sued on his contract to deny its validity, particularly where he has received the benefits arising from the agreement.

Cowell *v.* Springs Co., 100 U. S., 55.
Hasselman *v.* Mortgage Co., 97 Ind., 365.

"The principle is well settled that a creditor who has confirmed a fraudulent deed by receiving a ben-

efit under it, or has become a party to it, is estopped from afterwards impeaching it."

Williams *v.* Gideon, 7 Heisk. (Tenn.), 621.

Steam Navigation Co. *v.* Weed, 17 Barb. N. Y., 378.

A corporation may recover on a promissory note given for the repayment of money loaned by it, although it may have exceeded its powers in making the loan and violated a positive law.

Gold Mining Co. *v.* Bank, 96 U. S., 640; 27 Am. & Eng. Ency. of Law, pp. 363-367.

3. Appellant was a member of the association at the time the Act of 1891 was passed, and he is therefore estopped to contest the validity of a proceeding by the association, in which he participated. Appellee, like all similar associations is a co-operative institution. Appellant was a member and a part of it. If there was any illegality in the transactions of the association in Tennessee he was *particeps criminis* and shared the benefits. He cannot now be heard to say that an act in which he participated and in the profits of which he shared was invalid.

Eaton *v.* Aspinwall, 25 N. Y., 122.

Stockholders dealing with their corporation cannot defeat their contracts by alleging that it was a foreign corporation and had not complied with the State laws.

Kilgore *v.* Smith, 122 Pa. St., 48.

In discussing this question of estoppel, we have gone on the assumption that the contracts of foreign corporations failing to comply with the Acts of 1891 are, at the worst, not void, but merely non-enforcible. They may, like contracts barred by the Statute of Limitations, form the consideration for a new agreement. They are valid until disaffirmed by the party sought to be charged. They are enforcible in the hands of an innocent purchaser. And they will

not be set aside or canceled except upon the borrower's doing equity.

This is a correct assumption, without regard to the contested question as to whether the Acts of 1891 directly prohibit the enforcement of such contracts.

Lauter *v.* Mortgage Co., 85 Fed. Rep., 94.
Cæsar *v.* Capell, 83 Fed. Rep., 403.
N. Y. Assoc. *v.* Cannon, 99 Tenn., 344.

The only answer which appellant Bedford seems to make to this argument of estoppel is this: He gives his deposition, in which he swears that he was utterly ignorant of the law relating to foreign corporations and of the association's failure to comply with that law; that he learned of these several years later, when his counsel in this case informed him.

Transcript, p. 92, par. 116.

Col. Bedford was highly educated; was graduated at Lebanon, Tenn., as a bachelor of laws and actually practiced. He admits having heard of the maxim "*ignorantia legis*, &c." His contention cannot be taken seriously.

Upton *v.* Tribilcock, 91 U. S., 45, 50.

It should be noted here that the conditions imposed upon foreign corporations were that they should register their charters in every county in which they did business. It was therefore a matter of record as to whether or not these conditions had been performed, and appellants were therefore chargeable with notice of the fact that appellee had not complied with the act at the time the "advance" to Bedford was consummated.

XI.

THE CONTRACT BETWEEN APPELLANTS AND APPELLEE WAS NOT USURIOUS UNDER THE LAWS OF NEW

YORK REGULATING THE CONTRACTS OF BUILDING AND LOAN ASSOCIATIONS, AND AS THE CONTRACT MUST BE CONSTRUED IN ACCORDANCE WITH THE ARTICLES OF ASSOCIATION AND BY-LAWS OF APPELLEE AND THE LAWS AND JUDICIAL DECISIONS OF NEW YORK, THE FACT THAT SUCH A CONTRACT WOULD BE HELD USURIOUS IF MADE IN TENNESSEE, IS IMMATERIAL, AND THE COURT BELOW CORRECTLY ENFORCED THE CONTRACT ACCORDING TO ITS TERMS.

Counsel for appellants, in their brief, contend that "if the transactions in question were otherwise legal, the loan was usurious. In making the loan at $4,600, Bedford was required to pay a fixed premium of $460 and received only $4,140. Receiving a fixed premium for a loan of money (they say) is usury in Tennessee and in most of the States."

They further insist that "if the Eastern Building and Loan Association by its charter or the laws of New York was allowed to loan money upon fixed premiums, or to loan to members while excluding them from participation in profits, and was allowed to exclude all uncertainty and contingency by maturing the stock at a fixed time, yet it could not do this in carrying on business in Tennessee, as the Tennessee law did not allow this. The whole contract was permeated with usury, as 5 per cent. 'premium,' alias for interest, and 5 per cent. interest were charged in addition to the fixed premium of $460." And, finally, they say that "when it is remembered that the stock issued to Bedford matured at a fixed time, that he was to pay a fixed sum, and that he was forced to withdraw his stock and receipt in full, it is evident that the transaction was not in accordance with the principles applicable to building and loan associations and that the transaction should be treated as a plain loan of money."

Appellants' Brief, pp. 67, 69.

We have already pointed out that appellant Bedford did not "withdraw" his stock in the technical

sense of that term, but merely assigned and pledged it to appellee as collateral security for the "advance" to him under and in pursuance of the usual custom of appellee in such cases and its articles of association and by-laws.

Ante, pp. , fol. 75.
Transcript, pp. 33, 34; Deposition D. A. Pierce, Ans. to Interrogatory 20.

It is a settled law in this court, that if a rate of interest called for in a contract is permissible under the law of the State where the contract is to be performed, there is no usury.

Andrews *v.* Pond, 13 Pet., 78.
Cockle *v.* Flack, 93 U. S., 344, 347.
Miller *v.* Tiffany, 1 Wall., 298, 310.
Scotland County *v.* Hill, 132 U. S., 107, 217.

The Supreme Court of Tennessee has expressly decided, and such, of course, is the general rule, that the usury laws of Tennessee can have no extra-territorial effect.

Pioneer Assn. *v.* Cannon, 96 Tenn., 599.

Assuming, therefore, that the contract between appellants and appellee, under which the "advance" to appellant Bedford was made, are to be construed under the laws of New York, we find that the New York statutes under which the appellee was organized, contain the express provision: "Nor shall the imposition of fines for non-payment of dues or fees or other violation of the Articles of Association, nor shall the making of any monthly payment required by the Articles of Association, *or of any premiums for loans made to members*, be deemed a violation of the provisions of any statute against usury."

Laws of New York of 1851, Ch. 122, § 7; quoted, *ante*, pp. 50, 51, fols, 147, 148, 149.
Laws of New York of 1875, Ch. 564.

Construing this clause of the Act of 1851, the Court of Appeals of New York says: "The taking of a premium in such case is sanctioned by the Act of 1851 as amended by Chapter 564 of the Laws of 1875, and does not render the loan usurious."

Concordia Savings, &c., Assn. *v.* Reed, 93 N. Y., 474, 479.

The Supreme Court of Pennsylvania, passing upon a contract between the appellee and a citizen of Pennsylvania, identical in terms and method of execution with the one under consideration here, has held that: "A contract made by a resident of one State, who applied to become a member of a loan association situated in another State, to pay it money at the place of its residence is to be governed by the law of the latter State as to usury, although the contract was made through an agency situated within the State of the residence of such member and the payment of the money is secured by mortgage on land therein."

Bennett *v.* Eastern B. & L. Assn., 55 Am. St. Rep., 723; s. c. 177, Pa. St., 233.

It is true that in certain cases cited by appellants' counsel on their brief, doctrines contrary to the foregoing rule seem to have been enunciated by the courts of several States (Falls *v.* United States, &c., Co., 97 Ala., 417; Rhodes *v.* Missouri, &c., Co., 173 Ill., 621; Maroney *v.* Association, 116 N. C., 882; Followed in McIlwain *v.* Isely, 96 Fed. Rep., 68) But the Supreme Court of Tennessee has conclusively settled the proposition, so far as that State is concerned, that contracts between the appellee and its stockholders in Tennessee are to be construed in accordance with its Articles of Association and by-laws and the laws of the State of New York.

Miller *v.* Eastern B. & L. Assn., 53 S. W. Rep., 231; "Affirmed orally by Supreme Court, October 14, 1899" (53 S. W. Rep., 231, 234).

And we do not believe that this Court will give its sanction to the untenable doctrines laid down in the Illinois, North Carolina and Alabama cases, upon which appellants largely rely. Those decisions are against equity and good conscience and are in violation of that provision of the Constitution of the United States which requires that full faith and credit shall be given to the laws and judicial proceedings of each State by the courts of every other State.

Const. United States, Art. IV., § I.

This requirement is not a matter of mere comity between the States, but, as Judge Cooley phrases it, it "becomes a rule of Constitutional obligation."

Cooley's Constitutional Law (3d ed.), 203.

And so it has been held by this Court many times.

Huntington *v.* Attrill, 146 U. S., 657.

Gt. West. Tel. Co. *v.* Purdy, 162 U. S., 329, 334.

The charter of incorporation of the appellee expressly authorizes loans or advances to members upon the exact basis that was adopted in the case at bar.

Ante, p. 56, fols. 167, 168.

Transcript, p. 47.

Appellants lay much stress upon the proposition that they were required to pay a "fixed" premium, but the fixing of such a premium being authorized by the Articles of Incorporation of the appellee, has been held to be in strict accordance with the laws of New York.

Eagle Savings & Loan Co. *v.* Samuels, 43 App. Div. (N. Y.), 386, 388.

We have heretofore pointed out that the contracts between appellants and appellee are in strict accordance with the charter of incorporation of the appellee and the laws of New York, and have there cited numerous cases in support of this contention.

Ante, pp. 77, 78.

So far as appellant's proposition, quoted above, that the contract of appellants with appellee involved only a fixed and definite number of payments is concerned, it has been met and disposed of in a number of recent cases in the Courts of New York and elsewhere, to which the appellee was a party or by which it is bound.

House *v.* Eastern B. & L. Assn., 52 App. Div. (N. Y.), 163.

Heslin *v.* Eastern B. & L. Assn., 28 Misc. (N. Y.), 376.

O'Malley *v.* People's Assn., 92 Hun (N. Y.), 572.

Miller *v.* Eastern B. & L. Assn. (Tenn.), 53 S. W. Rep., 231.

The same doctrine laid down in these cases has just been adopted and followed by the Supreme Court of Appeals of Virginia in the case of Campbell *v.* Eastern B. & L. Assn. (not yet reported), in which the opinion of that learned Court was delivered on December 6, 1900, by Harrison, Judge. The opinion in question is so thorough and careful and the conclusion reached so much in point here that we print the opinion in full by way of an appendix to this brief.

Campbell *v.* Eastern, *post*, p. 147.

XII.

APPELLANTS' CONTENTION THAT THE DECREE OF THE TRIAL COURT, RENDERING JUDGMENT AGAINST MRS. BEDFORD, ALTHOUGH SHE IS A MARRIED WOMAN, AND DID NOT SIGN THE NOTES TO APPELLEE, CANNOT BE CONSIDERED IN THIS COURT, FOR THE REASON THAT THERE WAS NO ASSIGNMENT OF ERROR COVERING IT UPON THE APPEAL FROM THE CIRCUIT COURT TO THE CIRCUIT COURT OF APPEALS.

The first two assignments which are alleged by appellants' counsel to cover the point are mere de-

murrers to the decree, and fail to point out the distinction made upon this point in appellants' brief.

Transcript, p. 116.
Van Gunden *v.* Iron Co., 52 Fed. Rep., 838.
Railroad Co. *v.* Cutting, 68 Fed. Rep., 586.
Doe *v.* Mining Co., 70 Fed. Rep., 455.

"An assignment cannot be good under this rule (No. 11), if it is necessary to look beyond its terms to the brief for a specific statement of the question sought to be presented."

Grape Creek Co. *v.* Trust Co., 63 Fed. Rep., 891.

As any discussion by us of the merits of the alleged error in the decree against Mrs. Bedford might be a waiver of the point that there was no assignment of error under which it could be presented to the Circuit Court of Appeals, and therefore that it cannot be presented here, we forbear further comment upon this point.

Regretting the length to which this brief and argument have extended, and offering as our only excuse for such apparent prolixity the novelty and great importance of the questions involved in this case, and the extent of the appellants' brief, we now leave this case in the hands of this Court for final determination.

Respectfully submitted,

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APPENDIX "A."

Supreme Court of Appeals of Virginia.

CAMPBELL v. EASTERN BUILDING AND LOAN ASSOCIATION OF NEW YORK.	RICHMOND, December 6, 1900.

OPINION BY JUDGE GEORGE M. HARRISON.

The appellant being the holder of fifty-eight shares of the capital stock of the Eastern Building and Loan Association, applied for and obtained from said association an advance or loan upon his stock of $5,800. As security for this loan the stock was pledged as collateral, and a deed of trust given by appellant, upon certain real estate. This deed secures the payment of $6,849.34, evidenced by seventy-six promissory notes of even date with the deed, each for the sum of $91.84, except the three maturing last, which are for $48.34 each, all payable to the association at its home office in Syracuse, N. Y., and falling due, one, on the last Saturday of each succeeding month, until all are paid, being the dues on the stock and the interest and premium on the loan. The appellant paid the notes as they fell due down to and including that due on the last Saturday in November, 1898, when the payments ceased, leaving unpaid several of the notes. In December, 1898, the appellant instituted this suit praying that the contract be rescinded; that the defendant association be enjoined from collecting any further sums by reason of the

transaction; that it be compelled to cancel and deliver to appellant the five notes remaining unpaid; to cancel and destroy the certificates of stock; to wholly release and cancel the deed of trust, and repay to appellant the sum of $1,069.60, which represented the amount paid to the association in excess of the loan and six per cent. interest.

Conceding that the demurrer to the bill was properly overruled, and proceeding at once to the merits of the case, we will consider, in the order stated in the petition for appeal, the grounds therein alleged in support of appellant's right to the relief asked.

It is contended that the parties entered into a definite contract, whereby it was agreed that the entire debt should be discharged and paid off in seventy-eight monthly installments; that if this agreement was a mistake on the part of the association, such a mistake releases the appellant, and entitles him to a rescission of the contract upon repayment by him of the money which he received, with six per cent. interest thereon. And that if the association is released from the agreement, because it had no power to make such a contract, the appellant is also released and entitled to a restoration of the *status quo*.

It is not denied that the contract in question was a New York contract, and to be construed in accordance with the laws of that State.

We are unable to distinguish this case, in principle, from the case of Building Association *v.* Tinsley, 96 Va., 322. In that case, the loan was for a definite fixed period of eight years, the borrower undertaking to pay the interest and premiuns thereon in monthly installments; this he did for more than four years, when he ceased paying, and brought suit seeking to be released from his contract upon the ground that the loan was usurious. Following the decision of the Supreme Court of New York, in the case of O'Malley *v.* Building Association, we held that the association did not possess the power to issue a certificate specifying a

fixed period for the maturity of its stock, and that such a clause in the certificate should be construed as an estimated period of maturity; that if the borrowing member had complied with all the rules and regulations of the association, and fully kept his contract during the entire eight years, in which it was estimated that his stock would mature, and had then demanded payment, *he would only have been entitled to receive what his stock had then earned.*

The terms and conditions expressed in the certificates of stock, in connection with the application for membership, and the by-laws of the association form the contract between the association and each shareholder therein. The deed of trust given by appellant expressly provides that the loan in question was made pursuant to and accepted under the provisions of the by-laws which were thereby made a part of the contract, and appellant further covenanted and agreed therein that he would keep and perform all promises and engagements made and entered into with the association according to the true intent and meaning of its by-laws and articles of incorporation.

The contention of appellant throughout is based upon the theory that he is an ordinary borrower of money, ignoring the fact that he is a member of a mutual association, into which he has voluntarily entered, and bound by its articles and by-laws, which constitute part of his contract, and must therefore be given their proper effect in construing that contract. The members of the association have united together in a business venture for the common benefit. It is a mutual association and equality of right according to the interest of each member is the fundamental idea upon which it rests. The definite contract was made doubtless in good faith by both parties, but appellant had no legal right to rely upon such a consummation, he was taking chances with his fellow shareholders that the earnings would be sufficient, in the time specified, to declare, not his alone, but all

the stock matured. At the end of the seventy-eight months, if the stock had not matured, each shareholder could receive what his stock had then earned, or he could go on paying until it did mature. Appellant occupied no better or different position, as a borrower, than the mere holder of stock. He remained a member of the association, the money advanced being upon his stock at its maturity or par value. He had fifty-eight shares and was advanced $5,800. It was never contemplated that he should return the $5,800, but it was the intention and purpose of the contract, that he should continue to pay the dues on his shares, and the interest and premium on the advance, until his stock was matured which would cancel the $5,800.

If the contention of the appellant should prevail it would be at the expense of his fellow stockholders, and if each stockholder should demand settlement upon a like basis, it would thwart the scheme and purpose of the association and probably bankrupt it.

It is further contended that appellant is entitled to a rescission of his contract upon the ground that he was induced to become a purchaser of the stock, as a basis of the loan or advance subsequently secured, by fraudulent misrepresentations made by the agents of the association, as to the time when the stock would mature; that but for such representations of material existing facts, he would not have purchased the stock.

As we have already seen, the association itself had no power to guarantee that the stock would be matured in a fixed time, and therefore its agents could not, if they had attempted to do so, bind it by such representations or guarantees. And further, the agents had no power or authority to bind the association by the statements or representations relied on, for the reason that the certificate of stock, the terms of which appellant must be presumed to have known, as well as the by-laws, and the printed literature, which was in the hands of appellant, all expressly provided that no agent had authority to

change the contract in any way, and that the association assumed no obligation for any statements not contained in its printed literature.

A misrepresentation, the falsity of which will afford a ground of action for damages, or a bill for the rescission of a contract, must be as to an existing fact. It must be an affirmative statement of some fact, in contradistinction to a mere expression of opinion, which is ordinarily not presumed to deceive or mislead (Watkins *v.* Wytheville, &c., Co., 92 Va., 1: Max Meadows, &c., Co. *v.* Brady, *Id.*, 71). So far as the representations made in the printed literature are concerned, for reasons already stated, these are not sufficient to entitle appellant to rescind the contract. As to the representations touching the business of the company, they were merely to the effect that judging from its success in the past (it had only been in business a few months), the business would continue to grow to such an extent that the association would be able to fulfill its promise to close up the contract within seventy-eight months. There was no representation of a definite rate of earnings made by the company, upon which any calculation could be made to test the accuracy of this statement. It was the opinion of the agent, based upon speculations and business contingencies running far into the future, that the end desired by all would be realized. They were not affirmative statements of an existing fact such as the law requires, to entitle appellant to the relief asked.

Apart, however, from these considerations it is too well settled to need citation of authority, that where a party intends to repudiate a contract on the ground of fraud, he should do so as soon as he discovers the fraud; for if after the discovery of the fraud he treats the contract as a subsisting contract, he will be deemed to have waived his right of repudiation, and must then bring an action for damages for the deceit. And whenever a party to a contract has a right to elect whether he will avoid it or treat it as a subsisting contract, his elec-

ion may be manifested by acts as well as by words, and, when once made, is final, and cannot be retracted (Max Meadows, &c., Co. *v.* Brady, *supra*). It appears from the record that in March, 1898, appellant was informed by an agent of the company that the stock would not be matured in the time specified, and that twenty-eight more monthly installments would be required; and shortly thereafter received from the company its annual report, giving him the same information; whereupon he wrote to the company for a statement of what he owed under his contract; and received in reply a statement showing his indebtedness, based upon the additional monthly payments necessary to mature the stock. Notwithstanding all this clear and authoritative information on the subject, he took no action, but continued to pay his monthly installments until the following November, thus making nine several payments after full knowledge of the facts now relied on as ground for rescission. This was a ratification of the right to demand the additional installments that disentitles appellant to the relief now sought. He says he continued to make the payments, because he thought that, in any event, he would have to perform the obligation into which he had entered; and yet in his bill he asks that $1,069.60, a sum more than sufficient to cover the payments thus made, be refunded to him.

The final contention of appellant is that, if he was under an obligation to continue his payments beyond the seventy-six notes given by him for dues, premium and interest, then the contract is an indefinite one, and void for uncertainty. This position has been sufficiently answered by what has been already said. The company had no power to make anything but an indefinite contract, so far as the time when its stock would mature was concerned. To hold the contract invalid for this reason, would be to hold that all subscriptions to the stock of a building association, when the time for the maturity of the stock was not certain and fixed,

were invalid, whereas the contrary is the settled law governing in the construction of such contracts.

The learned counsel for appellant has commented in strong terms upon the harshness of the contract in question; so long, however, as such associations are permitted to do business in the State, and persons are found willing to embark in the enterprise, by becoming shareholders therein, the courts have no alternative but to enforce the contracts they are authorized to make.

For these reasons the decree appealed from is affirmed.

(A copy teste.)

GEO. K. TAYLOR,
C. C.

APPENDIX "B."

In another case, not yet reported, the Virginia Supreme Court of Appeals, on November 22, 1900, said:

"Conceding that the act approved March 5, 1890 (Acts 1889-90, pp. 170-1), entitled 'An Act relating to building and loan associations not incorporated in the State,' made it the duty of such an association to file with the Secretary of the Commonwealth a certified copy of the amendments to its charter and articles of incorporation, made after it commenced to do business in this State, as well as its charter or articles of incorporation in force prior to that time, it does not, we think, affect the rights of the parties in this case. That act makes it a misdemeanor, punishable by a fine of one hundred dollars, for any agent, officer or employee of such an association to do business in this State without complying with the provisions of the act, but it does not declare in terms that contracts made in violation of the act shall be void; nor is there anything in the act which

shows that it was the intention of the Legislature that they should be void. In the absence of any such intention, the rule seems to be well settled that such contracts will be enforced by the courts (Neimeyer *v.* Wright, 75 Va., and Cases cited; 2 Morawetz on Corp., Sec. 665 (2d Ed.))."

Eastern B. & L. Association *v.* Snyder, Supreme Court of Appeals of Virginia.

No. 153.

1856

Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 153.

H. L. BEDFORD AND LOU M. BEDFORD, HIS WIFE,
APPELLANTS, PETITIONERS,

vs.

EASTERN BUILDING AND LOAN ASSOCIATION OF SYRACUSE, NEW YORK, APPELLEE.

Waiver of Personal Decree Against Lou M. Bedford.

The appellee herein hereby waives any and all claims and demands against the appellant Lou M. Bedford arising out of or based upon the decree in this cause in the court below so far as it adjudges her personally liable to appellee, and hereby stipulates and agrees that an order or decree may be entered in this cause releasing her from said

liability upon such terms and conditions as to this honorable court may seem just.

This January 31, 1901.

EASTERN BUILDING AND LOAN ASSOCIATION, *Appellee*,
By WM. HEPBURN RUSSELL,
Its Counsel.

[Endorsed:] File No., 17558. Supreme Court U. S., October term, 1900. Term No., 153. H. L. Bedford *et al.*, petitioners, *vs.* The Eastern Building and Loan Association. Waiver of personal decree against Lou M. Bedford. Filed January 31, 1901.